Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

October Term, 1995

REDLAND SOCCER CLUB, INC. et al.,
Petitioners

vs.

DEPARTMENT OF THE ARMY OF THE UNITED STATES OF AMERICA
and
THE UNITED STATES OF AMERICA,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

A. Should this Court grant certiorari to review the decision of the United States Court of Appeals for the Third Circuit (hereinafter "Third Circuit") creating a requirement that Petitioners show that they need medical tests other than normally recommended tests in order to maintain a common law tort action seeking medical monitoring?

B. Should this Court grant certiorari to determine whether the Third Circuit was entitled to affirm an entry of summary judgment based upon an issue that was never raised in either the district court or in the Third Circuit?

C. Should this Court grant certiorari to review the Third Circuit's decision that Respondents had not waived the "deliberative process privilege" as to five documents voluntarily produced and to determine whether the Third Circuit erred by failing to hold that the privilege was inapplicable to those documents, that the District Court had erred in refusing to allow Petitioners to utilize factual information contained in those documents, and that the Respondents' status as a tortfeasor should be considered in balancing Petitioners' interest in obtaining discovery against Respondents' interests?

D. Should this Court grant certiorari to review the Third Circuit's decision that Respondent's *Touhy* regulation was properly applied to preclude Petitioners' counsel from contacting former Army employees regarding eyewitness observations concerning the usage, handling, and disposal of toxic and hazardous materials eight or nine years prior to the contacts and, if so, whether such an application violates Petitioners' First and Fifth Amendment rights?

E. Should this Court grant certiorari to review the Third Circuit's decision affirming the denial of class certification in this case?

F. Should this Court grant certiorari to review the Third Circuit's decision that Petitioners are not entitled to seek damages for negligent infliction of emotional distress?

LIST OF ALL PARTIES

In addition to REDLAND SOCCER CLUB, INC., the following parties are Petitioners in this case: REDLAND SOCCER CLUB, INC., BRETNI BRINK, a Minor, by TAMARA BRINK, RYAN BRINK, a Minor, by TAMARA BRINK, JOSEPH BRTALIK, CAROLE G. BRTALIK, JOSEPH J. BRTALIK, BRIAN BRTALIK, WENDY BRTALIK, a Minor, by JOSEPH and CAROLE G. BRTALIK, THEODORE F. BURD, DIANE M. BURD, CHRISTOPHER T. BURD, a Minor, by THEODORE F. and DIANE M. BURD, GREGORY C. BURD, a Minor, by THEODORE F. and DIANE M. BURD, DEWITT J. CLINE, JR., JAN M. CLINE, ERIC J. CLINE, a Minor, by DEWITT J., JR. and JAN M. CLINE, JEROMY J. CLINE, a Minor, by DEWITT J., JR. and JAN M. CLINE, RONALD W. DANNER, DANIELLE M. DANNER, a Minor, by RONALD W. DANNER, CRAIG A. DANNER, a Minor, by RONALD W. DANNER, THEODORE J. ELLIOTT, FRANCES M. ELLIOTT, TODD ELLIOTT, a Minor, by THEODORE J. and FRANCES M. ELLIOTT, TRACEY ELLIOTT, a Minor, by THEODORE J. and FRANCES M. ELLIOTT, STEVEN W. HAAS, IRMA L. RODGERS-HAAS, ANTHONY M. RODGERS, a Minor, by STEVEN W. HAAS and IRMA L. RODGERS-HAAS, NICOLE C. RODGERS, a Minor, by STEVEN W. HAAS and IRMA L. RODGERS-HAAS, LAWRENCE E. HAGER, RUTH A. HAGER, SAMUEL HAGER, BENJAMIN HAGER, a Minor, by LAWRENCE and RUTH HAGER, SHAWN HAGER, a Minor, by LAWRENCE and RUTH HAGER, EDWARD HOCKENBERRY, MARY L. HOCKENBERRY, BRETT R. HOCKENBERRY, a Minor,

by EDWARD and MARY L. HOCKENBERRY, ROGER L. HOCKENBERRY, PATRICIA D. HOCKENBERRY, KERIC L. HOCKENBERRY, a Minor, by ROGER L. and PATRICIA D. HOCKENBERRY, KODI B. HOCKENBERRY, a Minor, by ROGER L. and PATRICIA D. HOCKENBERRY, KLINT D. HOCKENBERRY, a Minor, by ROGER L. and PATRICIA D. HOCKENBERRY, DAVID G. HOOPER, PRISCILLA G. HOOPER, DAVID G. HOOPER, II, JOHN H. KNAUB, DEBORAH J. KNAUB, DEREK J. KNAUB, a Minor, by JOHN H. and DEBORAH J. KNAUB, SEAN M. KNAUB, a Minor, by JOHN H. and DEBORAH J. KNAUB, THOMAS R. KRAUSE, ROBERT A. KRAUSE, a Minor, by THOMAS R. KRAUSE, RICHARD H. LEBO, DONNA LEBO, TRISHA LEBO, a Minor, by RICHARD and DONNA LEBO, KRISTINA LEBO, a Minor, by RICHARD and DONNA LEBO, RALPH E. McCARTY, GALE P. McCARTY, JOSHUA H. McCARTY, a Minor, by RALPH E. and GALE P. McCARTY, LUCAS P. McCARTY, a Minor, by RALPH E. and GALE P. McCARTY, JAMES P. MEYERS, KIM MEYERS, SAMANTHA MEYERS, a Minor, by JAMES and KIM MEYERS, BRETT MEYERS, a Minor, by JAMES and KIM MEYERS, THOMAS M. MORROW, MEREDITH S. MORROW, GREGORY M. MORROW, a Minor, by THOMAS M. and MEREDITH S. MORROW, GEOFFREY T. MORROW, a Minor, by THOMAS M. and MEREDITH S. MORROW, JACK E. MUTH, KATHLEEN L. MUTH, ROBERT C. MUTH, a Minor, by JACK and KATHLEEN L. MUTH, JOHN A. NACE, JR., LINDA M. NACE, MICHAEL NACE, a Minor, by JOHN A. and LINDA M. NACE, ROBERT NACE, a Minor, by JOHN A. and LINDA M. NACE, KENNETH E. NACE, PAMELA R. NACE, JEREMY M. NACE, a Minor, by KENNETH E. and PAMELA R. NACE, KEVIN E. NACE, a Minor, by KEN-

NETH E. and PAMELA R. NACE, MELISSA A. NACE, a Minor, by KENNETH E. and PAMELA R. NACE, DEAN G. NEWHOUSE, NORMA J. NEWHOUSE, MARTIN NEWHOUSE, ERIC NEWHOUSE, BENJAMIN NEWHOUSE, a Minor, by DEAN G. and NORMA J. NEWHOUSE, PETER P. O'NEILL, ALICE L. O'NEILL, PETER O'NEILL, PATRICK O'NEILL, PAUL O'NEILL, PATRICIA A. PALM, DYLAN T. BUCKWALTER, a Minor, by PATRICIA A. PALM, MICHELLE A. BUCKWALTER, a Minor, by PATRICIA A. PALM, ROBERT J. PONTIUS, CINDY L. PONTIUS, JAY PONTIUS, a Minor, by ROBERT J. and CINDY L. PONTIUS, DEBRA S. POPP, ANDREW J. POPP, a Minor, by DEBRA S. POPP, THOMAS M. RADOS, a Minor, by SONJA RADOS, WILLIAM P. REHM, JR., KIMBERLY A. REHM, DAVID A. REHM, a Minor, by WILLIAM P., JR., and KIMBERLY A. REHM, ANDAR A. REHM, a Minor, by WILLIAM P., JR., and KIMBERLY A. REHM, DEON J. REHM, a Minor, by WILLIAM P., JR., and KIMBERLY A. REHM, MICHELLE D. REHM, a Minor, by WILLIAM P., JR., and KIMBERLY A. REHM, KEN RIBBLE, SUSAN RIBBLE, SCOTT RIBBLE, a Minor, by KEN and SUSAN RIBBLE, MARK RIBBLE, a Minor, by KEN and SUSAN RIBBLE, NEVIN C. SHENCK, JR., LISA L. SHENCK, NATHAN S. SHENCK, AARON M. SHENCK, a Minor, by NEVIN C., JR., and LISA L. SHENCK, REBECCA SHENCK, A Minor, by NEVIN C., JR., and LISA L. SHENCK, BRADLEY SHIRK, RICHARD V. SPONG, SR., JULIA A. SPONG, RICHARD V. SPONG, JR., NATHAN M. SPONG, JOELLE L. SPONG, BARRY L. STONE, MATTHEW D. STONE, COREY J. STROMAN, a Minor, by LOWELL R. and DEBRA J. STROMAN, DONNA L. SZOSZOREK, SHANNON M. SZOSZOREK, A Minor, by DONNA L. SZOSZOREK, SHAYNA M. SZOSZOREK, a

Minor, by DONNA L. SZOSZOREK, EUGENE K. TORBEK, ERIK P. TORBEK, a Minor, by EUGENE K. TORBEK, DONALD WILLIAMSON, ELIZABETH M. WILLIAMSON, MICHAEL WILLIAMSON, a Minor, by DONALD and ELIZABETH WILLIAMSON, WILLIAM B. WIRT, PAMELA A. WIRT, CHRISTINE E. WIRT, KEVIN M. WIRT, TIMOTHY B. WIRT, a Minor, by WILLIAM B. and PAMELA A. WIRT, BRYAN C. WIRT, a Minor, by WILLIAM B. and PAMELA A. WIRT, BURLIN COVERT, JOSEPH DORWART, III, PATRICIA A. DORWART, JOSEPH DORWART, IV, a Minor, by JOSEPH DORWART, III, and PATRICIA DORWART, ALICIA DORWART, a Minor, by JOSEPH DORWART, III, and PATRICIA DORWART, BRENT DORWART, a Minor, by JOSEPH DORWART, III, and PATRICIA DORWART, JACK H. HERSHBERGER, JR., JUNE HERSHBERGER, LARRY SMART, CAROL SMART, JEFFREY SMART, a Minor, by LARRY and CAROL SMART, CRYSTAL SMART, a Minor, by LARRY and CAROL SMART, GLENN DILLER, DALE KAHLER, ROBERT E. KANE, TERRENCE L. KEMBERLING, DAVID A. KUPP, E. ROBERT McCOLLUM, HERBERT D. MYERS, and WILBUR YORTY.

All Respondents are listed in the caption. None of the parties have parent companies or wholly-owned subsidiaries.

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In the
SUPREME COURT OF THE UNITED STATES

October Term, 1995
Redland Soccer Club, Inc., *et al.*,
Petitioners

v.

Department of the Army of the United States of America
and the United States of America,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justive and Associate Justices of the Supreme Court of the United States:

Petitioners, Redland Soccer Club, Inc., *et al.* respectfully pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Third Circuit (hereinafter "Third Circuit") entered on May 15, 1995, and the subsequent denial of the Motion for Reconsideration on July 13, 1995.

REFERENCE TO THE OPINIONS DELIVERED IN THE COURTS BELOW

The Third Circuit decision is reported as *Redland Soccer Club, Inc. v. Department of the Army of the United States*, 55 F.3d 827 (3rd Cir. 1995). Decisions of the District Court were reported at 835 F.Supp. 803 (M.D.Pa. 1993) and 801 F.Supp. 1432 (M.D.Pa. 1992). Those decisions and other decisions in this case that have not been reported in any official or unofficial reporter are included in the attached Appendix.

STATEMENT OF JURISDICTION

The Third Circuit's Judgment was entered on May 15, 1995, and reconsideration was denied on July 13, 1995. This Court's jurisdiction to consider this Petition from the final Judgment by the Third Circuit is invoked pursuant to 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS INVOLVED

(a) Fifth Amendment, United States Constitution:

"No person shall be...deprived of life, liberty, or property, without due process of law...."

(b) First Amendment, United States Constitution:

"Congress shall make no law respecting an establishment to religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

STATEMENT OF THE CASE

Petitioners filed a timely Notice of Appeal to the Third Circuit on December 23, 1993, from a final Judgment entered by the United States District Court for the Middle District of Pennsylvania (hereinafter "the District Court") on November 29, 1993. Following the submission of briefs by the parties, including the submission of supplemental memoranda requested by the Third Circuit, oral argument was held on June 22, 1994. That appeal was from a decision, *inter alia*, of the District Court entering summary judgment against Petitioners. (App. 82a; 835 F.Supp. 803).

The central issue upon which the Third Circuit affirmed summary judgment (*i.e.*, a requirement of different medical tests which is addressed in the first subsection of Reasons for Allowance of the Writ below) was not raised by Respondents in support of their Motion for Summary Judgment in the District Court, was not addressed by the District Court, was not raised by the parties in the Third Circuit appeal, and was not briefed or raised at oral argument. Rather, that issue was raised *sua sponte* by the Third Circuit only in its decision.

The original Complaint in *Redland Soccer Club, Inc. et al.*, (District Court No. 1:CV-90-1072) was filed on June 7, 1990, by five Plaintiffs (Respondents herein) as a class action. The District Court had jurisdiction under 28 U.S.C. §§1331, 1346, and 2671 and under 42 U.S.C. §9613(b) and had supplemental jurisdiction over state claims pursuant to 28 U.S.C. §1367. Petitioners' Complaint stated causes of action under the Federal Tort Claims Act (hereinafter "FTCA") and under the Comprehensive Environmental Response, Compensation, and Liability Act (hereinafter "CERCLA"), 42 U.S.C. §9601 *et seq.*, as well as claims under the Pennsylvania Haz-

ardous Sites Cleanup Act (hereinafter "HSCA"), 35 Pa. C.S. §6020.101 *et seq*. Following the District Court's denial of a Motion for Class Certification on March 4, 1991, and denial of a Motion for Reconsideration on May 3, 1991, Plaintiffs filed a First Amended Complaint which joined the 145 additional Plaintiffs who are now Petitioners to this Court.

Two related cases were filed in the District Court. On June 7, 1990, counsel for Petitioners filed a related action in *Robert C. O'Neal et al. v. Department of the Army et al.* (District Court No. 1:CV-90-1073). That action was consolidated with the instant action for discovery and pre-trial purposes. On February 26, 1991, separate Plaintiffs filed a Complaint in *Elliott et al. v. United States of America* (District Court No. 1:CV-91-0289) raising different claims but based on essentially the same facts entailed in the instant action. The *Elliott* action was consolidated with the instant action by Order of the District Court of September 30, 1993. The Third Circuit ultimately reversed and remanded the *Elliott* action but affirmed the entry of summary judgment in the instant action.

The factual background of these actions centers upon an Army installation which (at most times relevant to this action) was denominated the New Cumberland Army Depot (hereinafter "NCAD") and a fourteen-acre tract which was originally part of NCAD but subsequently became Marsh Run Park (hereinafter "the Park"). The tract was transferred by the Army to Fairview Township in 1976 and was converted into the Park by Fairview Township through grading and other work that commenced in 1981. Soccer fields were placed within the Park and were utilized for soccer practices and games from 1982 until August of 1987.

Four or five acres of the Park had been utilized as a landfill by NCAD during a period from 1917 until at least the mid-1950's. In April of 1987, the Army commenced testing of

the Park as part of the Defense Environmental Restoration Program. Following receipt of preliminary results from that testing, the Army closed the Park on August 28, 1987, placed a cordon around it, and assumed possession and control of it. Those preliminary results and other test results showed that the Park had been contaminated by numerous toxic and hazardous substances, including volatile organic compounds (*e.g.*, trichloroethylene, tetrachloroethylene, and methylene chloride), semi-volatile organic compounds (*e.g.*, hexochlorobenzene and pentochlorobenzene), including polycyclic aromatic hydrocarbons (*e.g.*, anthracene, benzo(a)anthracene, benzo (a)pyrene, benzo(b)fluoranthene, benzo(g,h,i)paralene, and benzo(k)fluoranthene), and metals (including arsenic, barium, beryllium, cadmium, chromium, lead, mercury, nickel, selenium, silver, thallium, and zinc).

Petitioners consist of three groups. The first is a group of twelve residents who lived adjacent to the Park and utilized it both prior and subsequent to its conversion into soccer fields. In addition, that group regularly utilized Marsh Run Creek, which borders the Park on the west and south, by wading and fishing in it and by drinking water from it. The second group consists of twelve Township employees who graded and levelled ground to create the Park, working in the Park on virtually a full-time basis for approximately six months and sporadically thereafter. The third group, consisting of all other Petitioners, are children and adults who participated in soccer activities at the Park, some of whom prepared the soccer fields by hand-picking rocks and other debris from its soil before grass was seeded.

Petitioners adduced both scientific and eyewitness testimony showing that they had been exposed to and ingested toxic and hazardous substances contaminating the Park and Marsh Run Creek. Petitioners adduced both scientific and medical testimony that their ingestion of toxic and hazardous

substances at the Park had caused them to suffer significantly increased risks of serious health problems, including various forms of cancer.

The contamination of the Park and Marsh Run Creek resulted not only from the Army's landfilling activities but from other sources. One of Petitioners' expert witnesses presented testimony concerning a number of additional sources at NCAD that contributed toxic contaminants to the Park. One of those sources of contamination was NCAD's practice of routinely discharging untreated industrial waste waters from its operations into its stormwater sewer system which then discharged those wastes into open drainage ditches and thence into Marsh Run Creek. In October and November of 1969, the Army's own Environmental Hygiene Agency reported that several Pennsylvania standards for Marsh Run Creek were not being met as a result of those discharges and recommended that those discharges cease. However, those discharges were continued by NCAD until at least September 25, 1974. Petitioners adduced evidence to show that a number of activities at NCAD which contributed contaminants to the Park and Marsh Run Creek constituted violations of Executive Orders directing the Army to comply with state environmental laws and violations of a number of the Army's own regulations. NCAD was repeatedly informed that its operations should be changed to comply with environmental regulations and statutes and was repeatedly cited for violating environmental laws.

Petitioners originally sought a number of forms of relief under FTCA, CERCLA, and HSCA, including injunctive relief, attorneys' fees and expenses, and various monetary damages. Petitioners specifically sought recovery of monetary damages to pay for medical monitoring of Petitioners and others and damages for emotional pain and suffering of Petitioners.

On November 19, 1991, Respondents produced for inspection boxes and filing cabinets filled with documents. Among the documents produced, Petitioners' counsel discovered a number of copies of a group of five documents in different boxes and filing cabinets. Although Petitioners' counsel designated those five documents for production, they were not produced; rather, Respondents designated those five documents as being among 139 documents that it was not producing under the "deliberative process privilege."

Petitioners received copies of the five documents only under a Confidentiality Stipulation that the District Court suggested the parties enter into, and those documents have remained confidential since that time. Petitioners filed a Motion to Compel production of all 139 documents, but the District Court denied that Motion by an Order of August 13, 1992, which did not specifically address the five documents that had previously been produced. When Petitioners subsequently notified Respondents that those documents or the facts set forth within them would be utilized at a scheduled deposition, Respondents notified Petitioners that they would refuse to allow any questioning based upon the documents themselves or the facts set forth therein.

Petitioners filed a second Motion to Compel, seeking the utilization of those documents or the facts therein at depositions, and the critical importance of those documents to this case was specifically argued, as follows:

Plaintiffs' counsel believe that three of those five documents prove the following material facts: (1) that the Army knew it had probably contaminated Marsh Run Park with toxic substances before the land was converted into a park; (2) that Defendants knew that the presence of those toxic substances raised a serious question as to whether the land should be used for athletic activities; and (3) that Defendants failed to disclose

their knowledge to Fairview Township even though the Township had raised these questions prior to converting the land into Marsh Run Park.

The District Court denied Petitioners' second Motion to Compel by Order of January 29, 1993.

The Third Circuit reversed in part and affirmed in part the District Court Orders. It directed that the District Court re-assess the applicability of the "deliberative process privilege" to the 139 documents on remand in the *Elliott* action. However, it affirmed the District Court's holding that the production of the five documents had not waived that privilege, and it failed to address the questions of whether the privilege did apply to those five documents, whether Petitioners should have been allowed to utilize facts embodied in those five documents, and whether Respondents' status as a tort-feasor should be considered in determining whether to apply that privilege in this case.

The District Court denied a Motion for Emergency Relief that had been filed by Petitioners by an Order of November 16, 1993. As part of pre-trial preparation in the *O'Neal* action (which, as noted above, was consolidated with the instant action for all pre-trial purposes), Petitioners had provided Respondents with a list of witnesses that identified several former employees of NCAD as potential trial witnesses for Petitioners. Specifically, those witnesses were designated to testify about their eyewitness observations concerning the routine handling, usage, and disposal of toxic and/or hazardous substances at NCAD during the course of their employments—some eight to nine years earlier. Respondents' counsel contacted those witnesses, however, and informed them that they should not speak with Petitioners' counsel unless Respondents' counsel approved of those contacts and unless Respondents' counsel was present during such contacts. Peti-

tioners' Motion specifically alleged that Respondents' instructions to Petitioners' witnesses constituted tampering with those witnesses and interference with Petitioners' pre-trial preparation.

The District Court denied Petitioners' Motion, ruling that the Respondents' actions were justified by an Army Regulation, 32 C.F.R. §516.35(d), which was valid under this Court's decision in *United States Ex Rel Touhy v. Regan*, 340 U.S. 462, 71 S.Ct. 416, 92 L.Ed.2d 417 (1951). The District Court failed to address Petitioners' arguments that (1) that regulation did not apply because the testimony sought did not constitute "official information," (2) that a *Touhy* regulation should not be applied in the context of litigation alleging wrongful conduct by the Government itself, and (3) that application of a *Touhy* regulation in the context of this case violated the Petitioners' and eyewitnesses' First Amendment rights and Petitioners' Fifth Amendment rights. The Third Circuit affirmed the District Court's denial of Petitioners' Motion for Emergency Relief without addressing any of those issues. (App. 28a; 55 F.3d at 834 n.2).

On September 15, 1992, the District Court dismissed without prejudice Plaintiffs' claims under CERCLA and HSCA on the basis that 42 U.S.C. §9613(h)(4) divested that Court of jurisdiction over such claims. Petitioners then filed an action in the Court of Common Pleas of York County, Pennsylvania to pursue their HSCA claims. When the state court entered summary judgment against Petitioners on the same basis upon which the District Court had done so, Petitioners filed an appeal to the Pennsylvania Superior Court. On July 14, 1995, the Pennsylvania Superior Court reversed the entry of summary judgment and remanded. (App. 12a). The Superior Court considered but specifically declined to adopt the Third Circuit's decision in this case to the extent that that

decision created a requirement concerning different medical testing. (App. 28a-29a).

In a decision of October 19, 1993, the District Court had entered summary judgment against Petitioners' common law tort claims on the basis that Petitioners had failed to show sufficient evidence that they had actually been exposed to the toxic contaminants in the Park's soil, but the Third Circuit disagreed with the District Court on that issue. (App. 55a-56a; 55 F.3d at 846). However, the Third Circuit affirmed that summary judgment on a basis that had not been raised, argued, or briefed, as discussed above. In addition, the Third Circuit affirmed the District Court's entry of summary judgment against Petitioners' claim for damages for negligent infliction of emotional distress on the basis that Petitioners had failed to show that they currently suffer a "medically-identifiable effect" from their exposure to toxic contaminants at the Park. (App. 59a; 55 F.3d at 848.)

REASONS FOR ALLOWANCE OF THE WRIT

A. The Court Should Grant Certiorari To Review The Decision Of The United States Court Of Appeals For The Third Circuit (Hereinafter "Third Circuit") Creating A Requirement That Petitioners Show That They Need Medical Tests Other Than Normally Recommended Tests In Order To Maintain A Common Law Tort Action Seeking Medical Monitoring

Courts throughout this country have struggled for more than a dozen years to establish coherent and practical standards to govern toxic tort cases. The need for such standards is great in light of the enormity of the underlying problem, since there are some fifty thousand (50,000) toxic waste sites in this country. *Senate Comm. on the Environment and Public Works*, 97th Cong., 2d Sess., Injuries and Damages from Hazardous Wastes—Analysis and Improvement of Legal Remedies, pt. II app. A at 2 (Comm. Print 1982).

The scope of that problem is particularly great in relation to the federal government. The military branches of the federal government, taken as a group, control and have responsibility for more toxic waste sites than any other single group or entity in this country. *See* Seth Shulman, *The Threat at Home—Confronting the Toxic Legacy of the U.S. Military* (Beacon Press, 1992). Base closing programs will not alleviate this problem but, rather, will exacerbate it, as attempts to convert or to convey military installations or land will result in revelations of specific toxic waste problems in instances where the public has been exposed to toxins.

Establishing standards for toxic tort cases has been a struggle because common law tort doctrines do not adequately

address the injuries entailed in toxic tort cases. *Ayres v. Township of Jackson*, 106 N.J. 557, 579-87, 525 A.2d 287, 298-302, 309 (1987). The extreme seriousness of the injuries that may result from toxic exposures, *i.e.*, various cancers, must be considered. *Id.* at 606, 525 A.2d at 312. Yet the inherent difficulty is that diseases caused by toxic exposures are insidious and have long latency periods. *See* Allan T. Slagel, *Note, Medical Surveillance Damages: A Solution to the Inadequate Compensation of Toxic Tort Victims*, 63 Ind. L.J. 849 (n.2) (1988) (hereinafter "Slagel"). For example, the latency period for occupational cancers caused by exposure to arsenic is estimated to be 25 years. *Id.* at 852 (n.15). Scientific uncertainty about the precise etiology of cancers further complicates the application of traditional tort principles. *Id.* Toxic tort cases have been aptly described as follows:

> "Typical hallmarks of a toxic exposure case include (1) uncertainty about medical causation; (2) an inchoate understanding of the etiology of cancer and other insidious diseases; (3) a long lead time between exposure and disease manifestation in the toxic exposure victim, barring many claims because of statutes of limitations; and (4) the lack of an identifiable present injury, traditionally required under tort rules." [footnotes deleted]

Kristen Chapin, *Comment, Toxic Torts, Public Health Data, and the Evolving Common Law: Compensation for Increased Risk of Future Injury*, 13 J. Energy Nat. Resources & Envtl. L. 129, 129-30 (1993)(hereinafter "Chapin").

A practical solution for the difficulties posed by toxic exposure cases which has been utilized by a number of state and federal courts is the awarding of costs for medical monitoring to the victims of such exposures. The public policy considerations which support such awards were summarized in *Day v. NLO*, 851 F. Supp. 869, 881 (S.D. Ohio 1994), as follows:

Reasons for Allowance of the Writ

There are a number of sound policy reasons for allowing recovery of medical monitoring costs. Some have been clarified in [*Potter v. Firestone Tire and Rubber Co.*, 6 Cal. 4th 965, 25 Cal. Rptr. 2d 550, 863 P.2d 795 (1993)], which involved a toxic landfill. In that case the California Supreme Courts [sic] listed for public policy considerations in granting medical surveillance:

> "First, there is an important public health interest in fostering access to medical testing for individuals whose exposure to toxic chemicals creates an enhanced risk of disease, particularly in light of the value of early diagnosis and treatment for many cancer patients.
>
> Second, there is a deterrence value in recognizing medical surveillance claims....
>
> Third, '[t]he availability of a substantial remedy before consequences of the plaintiffs' exposure are manifest may also have the beneficial effect of preventing or mitigating serious future illness and thus reduce the overall costs to the responsible parties.'
>
> Finally, societal notions of fairness and elementary justice are better served by allowing recovery of medical monitoring costs. That is, it would be inequitable for an individual wrongfully exposed to dangerous toxins, but unable to prove that cancer or disease is likely to have to pay the expense of medical monitoring when such intervention is clearly reasonable and necessary."

Potter, 863 P.2d at 824 (citations omitted). Therefore, if the plaintiffs can establish liability and an increased risk of disease, they will be entitled to medical monitoring.

Under federal law, medical monitoring is a remedy that is apparently available only in common law tort cases, since every Court of Appeals that has addressed the issue has held that medical monitoring is not available in private actions

under CERCLA.[1] *See, e.g., Price v. U.S. Navy*, 39 F.3d 1011, 1015 (9th Cir. 1994) and *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1535 (10th Cir. 1992).

The importance of deterring conduct that causes exposures to toxic substances has been emphasized by both courts and commentators. *Hansen v. CCI Mechanical, Inc.*, 858 P.2d 970, 980 (Utah 1993), Ind. L.J., *supra* at 869, and Leslie S. Gara, *Comments, Medical Surveillance Damages: Using Common Sense and the Common Law to Mitigate the Dangers Posed by Environmental Hazards*, 12 Harv. Envtl. L. Rev. 265, 268 (1988)(hereinafter "Gara"). Awarding medical monitoring may also prevent or at least minimize the consequences of toxic exposures, actually preventing deaths in some cases and thereby benefiting not only the victim/plaintiff but also the defendant and society as a whole. Slagel, *supra* at 869-70. Such awards may benefit the tort system and society by producing additional knowledge and evidence concerning the development of latent diseases. Gara, *supra* at 270. Furthermore, awarding medical monitoring prevents manifest injustice to victims who also suffer from economic disadvantage.

> "A decision by courts to reject a cause of action for medical surveillance damages will prove particularly harsh for those who cannot afford medical surveillance on their own. Those financially able to afford medical care will heed scientific and medical advice and undergo precautionary testing regardless of a judicial remedy. Those people will bear monetary loss, while the tort system suffers the casualty to its purposes of compensatory and, in many cases, deterrent justice. However, the poor do not have this option but are forced to rely on the legal system for redress at the price that they first suffer the

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[1] In contrast, the Pennsylvania Superior Court has held that medical monitoring is a remedy available under HSCA (App.. 1a-15a).

> indignity of allowing a possibly preventable or mitigatable illness to develop."

Id. at 269.

In light of the public policy considerations favoring medical monitoring, the difficulties that courts have experienced in creating relevant standards is, perhaps, surprising. However, many courts have refused to recognize exposures to toxic contaminants as legally cognizable "injuries." 63 Ind. L.J., *supra* at 859. The *Restatement (Second) of Torts*, §7 (1977) defines the term "injury" as including the invasion of any "legally protected interest." Furthermore, an individual's right to "bodily security" and the right to be free from negligent invasion of that interest has traditionally been recognized. *Id.* §1, Comment (a). Therefore, many courts, including the Third Circuit itself, have recognized that an "injury" has occurred where an individual has been exposed to and ingested toxic contaminants and where that exposure has caused the individual to suffer a significant increase in the risk of developing a serious disease. *In re Paoli R.R. Yard PCB Litigation*, 916 F.2d 829, 852 (3rd Cir. 1990) and *Merry v. Westinghouse*, 684 F. Supp. 847 (M.D. Pa. 1988). Nevertheless, the instant action amply demonstrates that the Third Circuit has both experienced and created problems in cases seeking medical monitoring.

The Third Circuit expressly found that Petitioners had adduced evidence sufficient to permit a reasonable factfinder to conclude that they had been exposed to and ingested hazardous substances and that that exposure caused them to suffer a significant increase in their risk of illness. (App. 57a; 55 F.3d at 847). However, the Third Circuit then created a new standard by holding that toxic tort plaintiffs seeking medical monitoring must show that a medical expert would recommend special testing of them that is different from tests recommended for the general population. (App. 57a-58a; 55 F.3d at 848). Although the Court's decision at one point

characterizes this new standard as a requirement of a "different medical monitoring regimen than that which would normally be recommended," this case demonstrates that the Court is actually requiring that the tests themselves, not the "regimen," be different. *Id.* Petitioners' medical expert actually did recommend a different regimen, requiring that medical testing start at earlier ages and occur at greater frequency than is recommended for the general population. Furthermore, the decision repeatedly emphasizes the types of tests recommended, not the overall regimen of testing. (App. 43a-44a and 58a; 55 F.3d at 841 and 848).

The Third Circuit's rationale for creating this new standard is that no exposure to toxic substances can be found to result in a significantly increased health risk unless a medical doctor recommends tests that are different from those recommended for the general population. (App. 54a; 55 F.3d at 846). However, the Third Circuit did not cite any medical or scientific support for that proposition, and no such support exists in the record of this case. Rather, the Court cited *Hansen*, *supra*, which had been cited by the Court in its earlier decision in *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717 (3rd Cir. 1994) (*Paoli II*). (App. 53a-54a; 55 F.3d at 845-46). However, neither of those decisions expressly or impliedly created any requirement for medical tests different from tests recommended for the general population. Although the Third Circuit's decision quotes language from *Hansen* concerning a plaintiff's requirement to show a different medical monitoring regime, it conspicuously neglects to cite the specific example given by *Hansen* to explain what is required. (App. 53a-54a; *Id.*).

> "For example, if the plaintiff is exposed to a toxic substance in large quantities or for a long duration and later is negligently exposed to the same substance in a small quantity or for a short duration by the defendant, there should be no recovery from the one causing the

> later exposure if it does not change the monitoring regime that would have been appropriate to the plaintiff before that exposure."

Hansen, supra, at 980. Thus, it is only in this case that a new standard has been created to require a showing that medical tests are recommended that differ from medical tests generally recommended by organizations such as the American Cancer Society. The Third Circuit's newly created requirement is erroneous. The rationale that a health risk cannot be deemed significant unless different medical testing is recommended is fallacious. The simple fact is that only a limited number of tests have been devised for the detection of various cancers which medical science finds both safe and efficacious. (App. 58a; 55 F.3d at 848). For example, if a group of workers is exposed to asbestos at their work place, medical experts would undoubtedly recommend the performance of chest x-rays, because chest x-rays are the best way of determining the effects of an asbestos exposure, yet chest x-rays are recommended for the general population. If a group of children is exposed to toxic contaminants that might drastically increase their risk of suffering leukemia, medical experts would recommend the performance of complete blood count testing, even though such testing is routinely performed. Once again, complete blood counts are simply one of the best ways of testing for leukemia. Thus, the fact that complete blood counts or chest x-rays are recommended in those instances does not, to any degree whatsoever, reflect the seriousness or significance of the health risk that has been suffered.

The Third Circuit has not presented any rationale to demonstrate how public policy would be served by its newly created standard. Certainly, the knowledge that medical monitoring will not be awarded unless victims can show the existence of medical testing which differs from tests normally

recommended will substantially undermine any deterrent factor that may otherwise exist. The new requirement will not foster the performance of medical testing that might prevent or mitigate serious future illnesses. The requirement contravenes equitable considerations, since even a tort-feasor who has been flagrantly negligent in disposing of toxic contaminants and, thereby, exposing members of the public to those toxic contaminants, may escape liability for medical testing. Moreover, that blanket requirement refuses to even consider the financial ability of the victims to pay for medical testing.

The American Cancer Society recommends that adults routinely undergo sigmoidoscopies to detect early signs of colon cancer, and such tests were recommended for Petitioners. Yet the record in this case fails to disclose what percentage of the population follows that recommendation. The record fails to reflect what percentage of the population does not follow that recommendation not because of the unpleasantness involved in the procedure, but because the expense involved prevents or deters them. Certainly, the record in this case is devoid of any consideration as to whether the individual Petitioners can afford such testing. Even if they could, however, the other public policy considerations discussed above should prevent the imposition of such costs upon the Petitioners and should require that the Respondents, as wrongdoers who exposed the Petitioners to toxic contamination, pay for such testing.

The Third Circuit's decision in this case may reflect judicial concern that marginal or even frivolous cases may be initiated. Certainly, a requirement that plaintiffs have a current "injury" to pursue a tort claim is designed to prevent marginal or frivolous claims. Nevertheless, in the toxic tort setting there are other and better ways of weeding out weak claims. Plaintiffs are required to introduce expert scientific testimony establishing that they have suffered a significant exposure to contaminants that are toxic in that they have been shown to cause serious, latent diseases such as cancer. Plain-

tiffs are further required to introduce medical and/or scientific evidence showing that that exposure has significantly increased their risk of suffering such an illness. To recover the costs of medical monitoring, plaintiffs must also introduce medical testimony to show that a specific regimen of medical testing should be done to prevent or mitigate those illnesses. If plaintiffs meet all of those standards, their claim will be neither marginal nor frivolous, and the Third Circuit's newly created standard is unnecessary.

This Court has not passed upon the standards that should apply in toxic tort cases seeking an award of medical monitoring. Such standards are an important question of jurisprudence throughout this country in light of the struggling over those standards that has occurred to date and in light of the likelihood that the prevalence of toxic waste sites in this country will generate an increasing number of lawsuits. Furthermore, a review of such standards is particularly appropriate because claims against branches of the military are likely to increase in light of the number of toxic waste sites created and controlled by branches of the military.

B. The Court Should Grant Certiorari To Determine Whether The Third Circuit Was Entitled To Affirm An Entry Of Summary Judgment Based Upon An Issue That Was Never Raised In Either The District Court Or In The Third Circuit

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This Court has vested the Courts of Appeals with discretion in determining when they may consider and resolve issues that are raised for the first time on appeal. *Singleton v. Wulff*, 428 U.S. 106, 121, 96 S.Ct. 2868, 2877, 49 L.Ed.2d 826 (1976). Nevertheless, that discretion is not unlimited. Thus, in *Singleton, supra*, the Court reversed the decision of a Court of Appeals to the extent that it considered an issue that had not

been considered by the trial court. *Id.* In *Fountain v. Filson*, 336 U.S. 681, 683, 69 S.Ct. 754, 755 (1949), this Court reversed a judgment of the Court of Appeals which had, in effect, granted summary judgment based upon an issue never raised in the trial court to a party who had not filed a motion for summary judgment. While affirming a Court of Appeals in *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 256, 68 S.Ct. 1031, 1034 (1948), this Court noted that the hearing of disputed facts, sorting of documents, ascertaining the form and meaning of the case, construing facts and drawing inferences from facts should primarily be left to a one judge court. In *Hormel v. Helvering*, 312 U.S. 552, 556, 61 S.Ct. 719, 721 (1941), this Court stated:

> "Ordinarily an appellate court does not give consideration to issues not raised below. For our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essentially in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence."

Thus, this Court has emphasized the importance of affording parties a full and fair opportunity to be heard on all issues.

The Courts of Appeals may have somewhat different views concerning the extent of discretion vested in them. In particular, the Third Circuit appears to view its discretion in particularly broad terms. Thus, in *Johnson v. Orr*, 776 F.2d 75, 83 n.7 (1985), the Third Circuit noted that it could affirm a decision of a district court on the basis of any issue, so long as the record supports the resolution of that issue, citing its prior

decisions in *Guthrie v. Lady Jane Collieries, Inc.*, 722 F.2d 1141, 1145 n.1(1983) and *Behring International, Inc. v. Imperial Iranian Air Force*, 699 F.2d 657, 666 n.7 (1983). Other Courts of Appeals appear to have narrower views of their discretion.

In *Charbonnages De France v. Smith*, 597 F.2d 406, 416 n.9 (1979), the Fourth Circuit noted that it could affirm a district court's grant of summary judgment on alternative grounds only if those grounds had been presented both to the district court and on appeal so that the non-moving party had a fair opportunity to contest those grounds. In *Federal Deposit Insurance Corp. v. Laguarta*, 939 F.2d 1231, 1240 (1991), the Fifth Circuit held that it was not proper to affirm a summary judgment on grounds that were neither raised below by the moving party nor even raised *sua sponte* by the District Court. The Seventh Circuit reached the same holding in *Box v. A & P Tea Co.*, 772 F.2d 1372, 1376 (1985). And *see Meredith v. Allsteel, Inc.*, 11 F.3d 1354, 1359 (7th Cir. 1993). In *O.R.S. Distilling Co. v. Brown-Forman Corp.*, 972 F.2d 924, 926 (1992) the Eighth Circuit held that a party could not assert a new argument in an appeal from a motion for summary judgment. In *Paskaly v. Seale*, 506 F.2d 1209, 1211 n.4 (1974), the Ninth Circuit noted that it was entitled to affirm the entry of a summary judgment on any ground supported by the record only if the parties had had an opportunity to discuss that ground in their briefs.

Courts of Appeal have also restricted the ability of district courts to enter summary judgments on issues which had not been clearly raised. In *John Deere Co. v. American National Bank, Stafford*, 809 F.2d 1190, 1192 (5th Cir. 1987), the Court held that a summary judgment must be reversed where a district court relies on grounds not advanced by the moving party as a basis for summary judgment. In *Malhotra v. Cotter & Co.*, 885 F.2d 1035, 1310 (7th Cir. 1989), the Court noted that a party opposing a motion for summary judgment is not

required to respond to any issue that the moving party could have raised but did not.

In the instant case, the Third Circuit affirmed the entry of summary judgment against Petitioners on an issue that had never been raised in the District Court, *i.e.*, whether Petitioners' medical expert had recommended medical tests that are not recommended for the general population. Furthermore, that issue was never raised in any of the briefs submitted to the Third Circuit. In fact, that issue was not even raised by the parties or by the Court itself at oral argument. Thus, Petitioners were never given an opportunity to address that issue.

That issue cannot be viewed as being solely a question of law; rather, it is a mixed question of law and fact. As discussed above, there are serious factual and legal questions concerning whether that issue should have been adopted as a standard requirement. For example, there is an issue about whether the fact that different medical tests were not recommended actually does reflect the seriousness or significance of the health risk experienced. There is a factual question as to whether any of the Petitioners lacked the financial means to have such testing done. There is a factual consideration concerning the precise extent to which the monitoring regimen recommended by Petitioners' expert differs in commencement and frequency from that recommended for the general population.

The concept that a party must be given the opportunity to be heard on any issue and particularly on any issue that forms the basis for an adverse judgment is one which has been recognized by this Court and most Courts of Appeal. That concept is not a procedural technicality. The right of a party to be heard on such an issue is a matter of fundamental due process. Thus, the Third Circuit's consideration of the issue concerning different medical tests without affording Petitioners an opportunity to be heard on that issue constitutes a clear error, an abuse of discretion, a denial of Petitioners' rights to due process under the Fifth Amendment, and a disregarding

of this Court's prior decisions. Thus, if this Court does not grant certiorari to review the underlying issue of whether the medical monitoring standard created by the Third Circuit is erroneous, it should grant review of the Third Circuit's raising of that issue.

C. This Court Should Grant Certiorari To Review The Third Circuit's Decision That Respondents Had Not Waived The "Deliberative Process Privilege" As To Five Documents Voluntarily Produced And To Determine Whether The Third Circuit Erred By Failing To Hold That The Privilege Was Inapplicable To Those Documents, That The District Court Had Erred In Refusing To Allow Petitioners To Utilize Factual Information Contained In Those Documents, And That The Respondents' Status As A Tort-feasor Should Be Considered In Balancing Petitioners' Interest In Obtaining Discovery Against Respondents' Interest

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The Third Circuit's decision affirming the District Court's determination that Respondents had not waived the "deliberative process privilege" because their disclosure of five documents was "inadvertent" does not review any of the facts concerning the production of those documents nor does it analyze in what way that production was "inadvertent." (App. 75a-76a; 55 F.3d at 856). Rather, it simply cites the decision in *TransAmerica Computer Co., Inc. v. International Business Machines Corp.*, 573 F.2d 646 (9th Cir. 1978). *Id.* However, *TransAmerica* turned upon the fact that IBM had been required to produce approximately 17 million pages of documents within a three month period in accelerated discovery proceedings that had been ordered by the district court.

TransAmerica, *supra* at 647-48. The appellate court's conclusion that the production of some specific documents wase "compelled" was carefully analyzed and arrived at. *Id.*

In the instant case, as discussed above, multiple copies of the five documents in question were voluntarily produced by Respondents at a production of documents that had been requested by Petitioners in the course of normal discovery procedures. Those multiple copies were located in different boxes and filing cabinets. No showing was ever made by Respondents that they were under any "compulsion" or that their production of those documents constituted excusable inadvertence. If a governmental assertion that a voluntary production of documents was merely "inadvertent" is accepted at face value by courts without consideration of the precise circumstances and without analysis of what constitutes an excusable "inadvertence," then the principle that a government can waive such privileges is nugatory.

The Third Circuit also failed to address the question of whether the deliberative process subspecies of executive privilege actually applies to the five documents in question. As discussed above, three of those five documents constituted critical evidence that the Army knew the Park had probably been contaminated with toxic substances but failed to disclose that knowledge even when Fairview Township made an inquiry. Yet the Third Circuit never considered whether the documents actually contained " 'confidential deliberations of law or policymaking, reflecting opinions, recommendations or advice.' " (App. 70a; 55 F.3d at 853 [citations omitted]). What "deliberations of law or policy-making" was going on at the time those three documents recorded events concerning communications between the Army and the Township?

The Third Circuit also failed to address the issue of whether Petitioners' counsel, being aware of facts recorded in the documents from having read them at the production, was entitled to utilize those facts in other discovery, even if the

documents themselves were privileged. Extending the "deliberative process privilege" to cover not only deliberations themselves but purely factual matters (for example, that a Township representative spoke to a specific representative of the Army on a specific date about a specific subject matter) extends that privilege in an unprecedented fashion.

Finally, the Third Circuit erred in its decision concerning the privileged status of those documents by failing to consider that under the circumstances of this case the Respondents should be viewed as tort-feasors. In fact, the very documents that the District Court held to be privileged were some of the best evidence of Respondents' tortious conduct. Thus, the Third Circuit erred by failing to consider that issue, to hold that the interests of the Petitioners in utilizing those documents clearly outweighed any interest that the Respondents have as tort-feasors in withholding them, and to reverse the District Court's decision on this issue.

D. This Court Should Grant Certiorari To Review The Third Circuit's Decision That Respondent Army's *Touhy* Regulation Was Properly Applied To Preclude Petitioners' Counsel From Contacting Former Army Employees Regarding Eyewitness Observations Concerning The Usage, Handling, And Disposal Of Toxic And Hazardous Materials Eight Or Nine Years Prior To The Contacts And, If So, Whether Such An Application Violates Petitioners' First And Fifth Amendment Rights

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The Third Circuit summarily rejected Petitioners' argument that the District Court had erred in denying their Motion for Emergency Relief. (App. 28a; 55 F.3d at 834 n.2). Thus, the Third Circuit did not address any of the arguments that had been raised in the District Court or on appeal by Respon-

dents concerning why the Army's *Touhy* regulation could not lawfully be applied to prevent eyewitnesses from communicating with Petitioners' counsel without the agreement and participation of Army representatives.

As noted above, these events unfolded on the eve of trial. The witnesses had knowledge concerning how they themselves and others had actually handled, used, and disposed of toxic or hazardous substances at NCAD eight or nine years earlier. The witnesses were civilian employees whose jobs were not highly ranked, supervisory positions. Nevertheless, neither the District Court nor the Circuit Court ever addressed the issue of whether the testimony sought from those eyewitnesses constituted "official information" which fell within the Army's *Touhy* regulation.

Petitioners raised a number of other issues on appeal. For example, Petitioners raised the issue of whether a *Touhy* regulation could properly be applied to individuals who had held somewhat menial positions only many years earlier. Petitioners argued that no court had ever upheld the usage of a *Touhy* regulation to preclude a private litigant from obtaining relevant and probative eyewitness testimony in a case against the Government alleging that the Government itself had been guilty of tortious conduct. Petitioners argued that the District Court abused its discretion by denying the Motion for Emergency Relief without affording the Petitioners a hearing or even an opportunity to submit a brief in support of that Motion. Petitioners argued that to allow the Government to apply a *Touhy* regulation to prevent communications between eyewitnesses and counsel under the circumstances of this case violated Petitioners' and the eyewitnesses' rights to freely associate under the First Amendment and violated Petitioners' rights to due process under the Fifth Amendment.

The Third Circuit's failure to address any of the arguments on this matter that had been raised by Petitioners has the effect of extending this Court's decision in *Touhy*, *supra*,

beyond anything intended by this Court and beyond the bounds of reason. The effect of the Third Circuit's refusal to consider those arguments is to allow the Government to apply a *Touhy* regulation to preclude a private litigant from contacting any former employee of the Government concerning any factual matters, regardless of the nature of those factual matters and regardless of the remoteness in time of the employment, even where the litigant has adduced evidence that the Government has engaged in tortious conduct.

E. This Court Should Grant Certiorari To Review The Third Circuit's Decision Affirming The Denial Of Class Certification In This Case

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The Third Circuit summarily rejected Petitioners' argument that the District Court had abused its discretion by denying class certification of this action. (App. 27a-28a; 55 F.3d at 834 n.2). The utilization of a class action mechanism is particularly important in the context of toxic tort litigation. *Slagel, supra* at 856 and *Gara, supra* at 297-98. Federal courts have certified class actions seeking medical monitoring. *Day, supra* at 883, *citing General Telephone Co. v. Falcon*, 457 U.S. 147, 159, 102 S.Ct. 2364, 2371, 72 L.Ed.2d 740 (1982).

In the instant case the District Court denied class certification on the basis that Petitioners would be required to prove their exposure to toxic substances on an individual basis. However, as commentators have suggested, numerous common issues exist in cases seeking medical monitoring that can be more efficiently and appropriately dealt with on a class-wide basis. *Slagel* and *Gara, supra*. In the instant case, for example, all questions concerning the Respondents' liability (*i.e.*, their tortious conduct) could be dealt with on a class-wide basis. Scientific and medical testimony concerning what exposures occurred from engaging in various activities at the Park

and which durations of activities would create a significant health risk could more efficiently and appropriately be dealt with on a class-wide basis. In fact, the only individual consideration is the precise amount of time that each Petitioner spent engaging in which activities at the Park.

This Court has not decided the question of whether the class action mechanism should be utilized in toxic tort cases seeking medical monitoring to promote the efficiency of the judicial process as well as justice to the victims of toxic exposures. For the reasons discussed in the first subsection of these Reasons for Allowance of the Writ the granting of certiorari to consider this issue would be wholly salutary and consistent with public policy.

F. This Court Should Grant Certiorari To Review The Third Circuit's Decision That Petitioners Are Not Entitled To Seek Damages For Negligent Infliction Of Emotional Distress

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The Third Circuit affirmed the District Court's dismissal of Petitioners' claims for infliction of emotional distress on the basis that Petitioners had failed to show that they suffered a physical injury or impact. (App. 58a; 55 F.3d at 848). In *Merry v. Westinghouse Electric Corp.*, *supra*, the District Court held that a physical impact sufficient to justify damages for emotional pain and suffering was established where it was shown that plaintiffs had inhaled, ingested, and absorbed hazardous substances. The Third Circuit attempts to distinguish that case on a basis that does not exist. (App. 58a-59a; 55 F.3d at 848).

A holding that proof that an individual plaintiff has ingested toxic contamination and has consequently suffered a significantly increased health risk is a sufficient physical impact to justify a claim for infliction of emotional distress is completely consonant with common law and, more importantly, is

completely consonant with the public policy considerations discussed above. Thus, the Third Circuit's rejection of such a holding constitutes the imposition of a standard applicable to toxic tort litigation which is consonant with its newly created standard for medical monitoring. Therefore, if this Court grants certiorari to review the first question identified in this Petition, it should also review this correlative issue.

CONCLUSION

This Court should grant certiorari to review the second question identified above because the decision of the Third Circuit decides a federal question in a way that conflicts with applicable decisions of this Court and conflicts with decisions of other Courts of Appeal. This Court should grant review of the fourth question because it conflicts with the applicable decision of this Court. This Court should grant certiorari to review the other questions presented above because they constitute important questions of federal law that have not been, but should be, settled by this Court.

Respectfully submitted,
SHUMAKER WILLIAMS, P.C.
LAURENCE W. DAGUE
RAJA G. RAJAN
DAVID R. BRESCHI
Attorneys for Petitioners

Dated: October 10, 1995

CERTIFICATE OF SERVICE

I, Laurence W. Dague, Esquire, of the law firm of Shumaker Williams, P.C., hereby certify that on this date a true and correct copy of the foregoing Petition for Writ of Certiorari was served on the following persons:

Solicitor General
Department of Justice
Washington, D.C. 20530

John T. Stahr
Environment and Natural Resources Division
P.O. Box 23986
Washington, D.C. 20026-3986

J. Adam Bain, Esquire
Torts Branch, Civil Division
U.S. Department of Justice
Box 340, Ben Franklin Station
Washington, D.C. 20044

SHUMAKER WILLIAMS, P.C.
LAURENCE W. DAGUE

Dated: October 10, 1995

J. A17035/95

IN THE SUPERIOR COURT 0F
PENNSYLVANIA

No. 00338 Harrisburg 1994

REDLAND SOCCER CLUB, INC.,
RICHARD V. SPONG, SR.,
RICHARD V. SPONG, JR., ET AL,

Appellants

v.

DEPARTMENT OF THE ARMY AND
DEPARTMENT OF DEFENSE,

Appellees

Appeal from the Order Entered May 5, 1994, in
the Court of Common Pleas of York County,
Civil, No. 92-SU-05339-01

BEFORE: CAVANAUGH, McEWEN, and DEL SOLE, JJ.

MEMORANDUM:

FILED JUL 14 1995

This appeal has been taken by appellants, Redland Soccer Club, Inc., et al, from an order which granted summary judgment in favor of appellees, the Department of the Army and the Department of Defense of the United States of America, and dismissed all of the claims presented by appellants. We reverse in part and remand.

Marsh Run Park (hereinafter "the Park") consists of approximately 14 acres that were originally part of the New Cumberland Army Depot (hereinafter "NCAD"), an installation owned by the United States Army. Four or five acres of

the park had been utilized as a landfill by NCAD during a period from 1917 to at least the mid-1950s. The Army transferred ownership of the Marsh Run tract to Fairview Township in 1976, having covered the landfill with a layer of soil and coal ashes prior to the transfer.

The 14-acre tract was converted into a Park by Fairview Township through grading and other work that commenced in 1981 and was accomplished by Township employees. Soccer fields, which were placed within the area of the former landfill, were utilized for soccer practices and games from 1982 until August of 1987, when the Army commenced testing of the Park as part of the Defense Environmental Restoration Program. The Army closed the Park on August 28, 1987, placed a cordon around it, and assumed possession and control of the area following receipt of the preliminary results from the Defense Environmental Restoration Program testing. The Army conducted a remedial investigation and feasibility study from 1988 through 1990 pursuant to CERCLA[1], to determine the nature and extent of the contamination and to evaluate alternatives for remedial action. The Army, in June of 1991, issued a record of decision under Section 104 of CERCLA, 42 U.S.C. §9604, selecting a cleanup remedy consisting of a vacuum extraction process to remove soil contaminants, and a ground water treatment system, with a total projected cost of 5.5 million dollars.

Appellants, 152 individuals who consist of three groups who had contact with the landfill area,[2] filed an action in U.S. District Court for the Middle District of Pennsylvania on June

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[1] The Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§9601 *et seq.*

[2] The first is a group of residents who lived adjacent to the Park, while the second group consists of employees of Fairview Township who graded the 14-acre tract to form the Park. The third group, consisting of all other appellants, are children and adults who participated in soccer activities at the Park, primarily through practicing, playing, and/or coaching soccer.

7, 1990, seeking class certification and requesting, *inter alia,* the establishment of a medical monitoring trust fund pursuant to the provisions of CERCLA, the Federal Tort Claims Act, and the Pennsylvania Hazardous Sites Cleanup Act, 35 P.S.§§6020.101 *et seq.* (hereinafter "HSCA"). Class certification was denied by the district court by order dated March 4, 1991. The district court subsequently granted judgment on the pleadings in favor of appellees on the claim of appellants for medical monitoring, holding that such costs are not recoverable response costs under CERCLA. The district court, however, denied appellees' motion for judgment on the pleadings as to the claim of appellants for medical monitoring costs under the HSCA, finding that Section 702(a)(5) of the HSCA specifically designated medical monitoring costs as response costs and that Section 702(a)(3) provided for a private cause of action to recover such costs. Subsequently, the district court, by order dated September 15, 1992, dismissed without prejudice all of the claims of appellants for injunctive relief and held that attorneys' fees and expert witness' fees were not recoverable costs under CERCLA or under the HSCA. *See: Redland Soccer Club Inc. v. Department of the Army,* 835 F.Supp. 803, 809-810 (M.D. Pa. 1993), *aff'd. on other grounds,* F.3d (3rd Cir; 1995).

Appellants then filed an appeal to the Third Circuit Court of Appeals from the order of September 15, 1992, and filed the instant action in the Court of Common Pleas of York County on November 24, 1992, pursuant to the provisions of the HSCA, alleging that they had been exposed to and ingested the toxic and hazardous substances contaminating the Park and Marsh Run Creek. Appellants alleged in their complaint that their exposure to those toxic and hazardous substances in the Park and in Marsh Run Creek had resulted in significant health risks to them, and sought (1) creation of a medical monitoring fund for the payment of costs related to future

health examinations necessitated by the alleged exposure to toxic substances, (2) an injunction requiring the Army to take remedial action in compliance with the provisions of the HSCA, (3) monetary damages, and (4) response costs, attorneys' fees, and expert witness' fees. Appellants also sought class certification for the aforementioned three groups of plaintiffs.

The trial court denied class certification by order dated October 15, 1993, and, subsequently, on April 28, 1994, granted the motion of appellees for summary judgment as to the claim for medical monitoring, and held that appellants' request for injunctive relief was moot given the grant of summary judgment, and dismissed the claim for attorneys' fees and a jury trial.

Appellants request that we reverse and remand, arguing that:

1. Summary judgment was improperly entered as there were disputed issues of material fact;

2. Attorneys' fees are recoverable in private actions under the HSCA;

3. Jury trials are available under the HSCA; and

4. The trial court committed reversible error when it denied class certification.

The distinguished Judge John C. Uhler has ably discussed and correctly rejected the allegations of error concerning the denial of class certification and the absence of a right to a jury trial under the HSCA, and as a result, it would be purposeless for this Court to elaborate upon that discussion. We find ourselves constrained to disagree, however, with the conclusion of the trial court concerning the recovery of attorneys' and witness' fees under the HSCA and the propriety of the entry of summary judgment at this stage of the proceedings.

Appellants argue that the court misapplied the appropriate standard of review in ruling upon the motion for summary judgment. Rule 1035(b) provides that summary judgment "shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is *no genuine issue as to any material fact* and that the moving party is entitled to a judgment as a matter of law" (emphasis supplied). Rule 1035(d) provides that "when a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."

"The moving party has the burden of proving the nonexistence of any genuine issue of material fact. *Thompson Coal Co. v. Pike Coal Co.*, 448 Pa. 198, 202-204, 412 A.2d 466, 468-469 (1979). The record must be viewed in the light most favorable to the nonmoving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party." *Marks v. Tasman*, 527 Pa. 132, , 589 A.2d 205, 206 (1991). *Accord: Commonwealth, Dept. of Environmental Resources v. Bryner*, 149 Pa.Super. 59, , 613 A.2d 43, 45 (1992).

Appellants persuasively argue that the holding of *Nanty-Glo* precludes the entry of summary judgment against them since there is a disputed issue of material fact as to the actual exposure of each of the appellants to the toxic chemicals disposed of by the appellees in the landfill and by discharge into Marsh Run Creek.

Since *Bremmer*, there have been numerous cases addressing the *Nanty-Glo* doctrine in the context of summary judgments. *See, e.g., Penn Center House, Inc. v.*

Hoffman, supra; Thompson Coal Co. v. Pike Coal Co., supra; Johnson v. Johnson, supra; Garcia v. Savage, supra; Troy v. Kampgrounds of America, Inc., supra. A review of these cases demonstrates that there is an inherent three-step process involved in determining whether the *Nanty-Glo* rule applies so as to preclude a grant of summary judgment. Initially, it must be determined whether the plaintiff has alleged facts sufficient to establish a *prima facie* case. If so, the second step is to determine whether there is any discrepancy as to any facts material to the case. Finally it must be determined whether, in granting summary judgment, the trial court has usurped improperly the role of the jury by resolving any material issues of fact.

It is only when the third stage is reached that *Nanty-Glo* comes into play. Thus, it is true that *Nanty-Glo* precludes summary judgment where the moving party relies solely upon testimonial affidavits and depositions of his witnesses to resolve material issues of fact. However, if there are no material issues of fact, or if the non-moving party has failed, in the first instance, to allege facts sufficient to make out a *prima facie* case, then summary judgment may be granted properly, even if the moving party has only set forth the pleadings and depositions of his witnesses in support thereof. Hence the language of Pa.R.C.P. 1035, which provides that "[a]fter the pleadings are closed, but within such time as not to delay trial, any party may move for summary judgment on the pleadings and *any* depositions, answers to interrogatories, admissions on file and supporting affidavits." Pa.R.C.P. No. 1035(a). Error only occurs if the moving party, in relying upon the testimonial affidavits of his witnesses, is attempting to resolve a material issue of fact,

or more importantly, is attempting to demonstrate the lack of any material issues of fact by asserting that the testimony of his witnesses is uncontradicted.

If there are no material issues of fact in dispute, and plaintiff has failed to allege facts sufficient to make out a *prima facie* case, as a matter of law, then summary judgment may be granted properly. Such was the result reached by our supreme court in *Thompson Coal Co. v. Pike Coal Co.*, 488 Pa. 198, 412 A.2d 466 (1979). When confronted with appellant's argument that the trial court erred in granting summary judgment, in light of *Bremmer, supra,* and *Nanty-Glo, supra,* the court concluded:

> We have no credibility issue here. Assuming everything that appellants argue is accepted as pristine truth, appellants fail to make out a *prima facie* case *as a matter of law,* not as a matter of fact.

Thompson Coal Co., 488 Pa. at 213-14, 412 A.2d at 474.

Dudley v. USX Corporation, 414 Pa.Super. 160, , 606 A.2d 916, 920 (1992), *allo. denied*, 532 Pa. 663, 616 A.2d 985 (1992) (footnote omitted). *Accord: Thompson v. Anderson*, 429 Pa.Super. 532, , 632 A.2d 1349, 1350-1351 (1993).

Thus, only where *the facts alleged* by the plaintiffs, when taken as true, are insufficient as a matter of law to establish a *prima facie* case, may summary judgment be properly entered. The trial court in the instant case, relying upon a single expert report contained in a record running to in excess of one thousand pages, held:

> ... the Risk Assessment provides a risk characterization based on an estimated time of exposure. It, however, does not show for the purposes of a cause of action under HSCA for medical monitoring that the plaintiffs in this case were significantly exposed to a hazardous substance.

The trial court then held that appellants had failed to allege facts sufficient to prove the *actual exposure* to hazardous substances necessary to establish a *prima facie* case for medical monitoring under the HSCA and granted the motion of appellees for summary judgment. This was error. Appellants have *alleged* actual exposure and the documents produced in opposition to the motion for summary judgment establish that numerous issues of disputed fact concerning the nature and extent of that exposure exist. The evidence, moreover, is such that expert testimony is necessary in order for the court to properly evaluate the many test results and reports produced by the parties. This type of inquiry is *not* appropriate in ruling on a motion for summary judgment, where the obligation of the court is simply to ascertain if the facts, as alleged by the plaintiffs, are sufficient as a matter of law, if found to be true, to establish a cause of action. Our review of the record compels the conclusion that the facts as alleged by appellants are sufficient to establish a *prima facie* case under the HSCA.

On May 15, 1995, the Third Circuit, although affirming the order which dismissed the federal action filed by appellants, also found that appellants had produced sufficient evidence of exposure to avoid the entry of summary judgment:

> ... there is enough evidence to create a genuine issue of material fact as to whether persons using the Park for thirty-three hours or more had enough exposure to carcinogens and non-carcinogenic toxins to create a significant risk to their health.

Redland Soccer Club Inc. v. Department of the Army, F.3d , (3rd Cir; No. 93-7829; filed May 15, 1995) (slip op. at p. 43). The Circuit Court, in affirming the dismissal of the federal claims of all of the instant appellants, except the

Elliotts, relied upon rulings made in prior decisions of that Court.

The Third Circuit in *In re Paoli R.R. Yard PCB Litigation*, 916 F.2d 829, 851 (3rd Cir. 1990) (Paoli I) had earlier concluded that, presented with the issue, the Pennsylvania Supreme Court would recognize a cause of action for medical monitoring, and set forth a four-part test to ascertain when medical monitoring would be appropriate:

> 1. The plaintiff was significantly exposed to a proven hazardous substance through the negligent actions of the defendant.
>
> 2. As a proximate result of exposure, the plaintiff suffers a significantly increased risk of contracting a serious latent disease.
>
> 3. That the increased risk makes periodic diagnostic medical examinations reasonably necessary.
>
> 4. Monitoring and testing procedures exist which make the early detection and treatment of the disease possible and beneficial.

In re Redland Soccer Club, supra, 916 F.2d at 852.

Subsequently, the Third Circuit, in *In Re Paoli R.R. Yard Litigation*, 35 F.3d 717 (3rd Cir. 1994) (Paoli II) adopted the ruling of the Utah Supreme Court in *Hansen v. CCI Mechanical, Inc.*, 858 P.2d 970 (Utah 1993) and held:

> In order for a plaintiff to show significant exposure that causes a significantly increased risk to plaintiff of contracting a serious disease that makes periodic testing reasonably necessary, we think that a plaintiff must:
>
> prove that by reason of the exposure to the toxic substance caused by the defendant's negligence, a reasonable physician would prescribe for her or him a monitoring regime

different from the one that would have been prescribed in the absence of that particular exposure. This is because under this cause of action, a plaintiff may recover only if the defendant's wrongful acts increased the plaintiff's incremental risk of incurring the harm produced by the toxic substance enough to warrant a change in the medical monitoring that otherwise would be prescribed for that plaintiff.

The court continued: [I]f a reasonable physician would not prescribe it for a particular plaintiff because the benefits of the monitoring would be outweighed by the costs, which may include, among other things, the burdensome frequency of the monitoring procedure, its excessive price, or its risk of harm to the patient, then recovery would not be allowed.

In re Paoli R.R. Yard Litigation, supra, 35 F.3d at 788, quoting, *Hansen v. CCI Mechanical, Inc., supra,* 858 P.2d at 980.

The Third Circuit Court in *Redlands, supra,* applying Paoli I and II, concluded that

"Significant exposure," therefore, refers to an exposure which, either by duration or harm, is sufficient to cause a significantly increased risk, which in turn is sufficient to require a monitoring regime *different from that normally required in the absence of such an exposure.*

Redlands, supra, F.3d at (slip op. at 34) (emphasis supplied).

The Circuit Court then affirmed the entry of summary judgment as to all plaintiffs other than the Elliotts based on that Court's conclusion that appellants "had failed to show that their exposure made any medical monitoring tests or examinations necessary or desirable other than those that health care professionals recommend for people who have had no expo-

sure to any of the toxic substances that might be found at the Park." *Id.*

Since we are not bound by federal court decisions interpreting state law, we decline to adopt the "different monitoring regime" rule devised by the Utah Supreme Court in *Hansen v. CCI Mechanical, Inc., supra,* as we find the rule is not a necessary element of a cause of action under the Pennsylvania Hazardous Sites Cleanup Act. Thus, since appellants produced sufficient evidence to create a genuine issue of material fact regarding actual exposure to hazardous substances, summary judgment may not properly be entered on this record.

Appellants also argue that the trial court erred in concluding that attorneys' fees are not recoverable in private actions under Section 1115 of the HSCA. Section 1115 provides:

> *§6020.1115. Citizen suits*
>
> *(a) General Rule.*—A person who has experienced or is threatened with personal injury or property damage as a result of a release of a hazardous substance may file a civil action against any person to prevent or abate a violation of this act or of any order, regulation, standard or approval issued under the act.
>
> *(b) Jurisdiction.*—The courts of common pleas shall have jurisdiction over any actions authorized under this section. No action may be commenced under this section prior to 60 days after the plaintiff has given notice to the department, to the host municipality and to the alleged violator of this act, or of any regulations or orders of the department under this act; nor may such action be commenced when the department has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a state to require compliance with the statute, permit, standard, regulation, condition, re-

quirement prohibition or order. In any such civil action commenced by the department, any person may intervene as a plaintiff as a matter of right. The court may grant any equitable relief; may impose a civil penalty under section 1104; *and may award litigation costs, including reasonable attorney and witness fees, to the prevailing or substantially prevailing party whenever the court determines such an award is appropriate.*

(c) Departmental intervention.—The department may intervene as a matter of right in any action authorized under this section.

35 P.S. §6020.1115(b)(footnote omitted)(emphasis supplied).

Contrary to the conclusion of the trial court, we believe the emphasized portion of subsection (b) of the Act refers to citizens' suits and *not* solely to actions instituted by the government. We, therefore, reverse that portion of the order of April 28, 1994, which dismissed the claims of appellants for attorneys' and witness' fees and remand for proceedings consistent with the foregoing.

Order reversed in part and affirmed in part. Case remanded. Jurisdiction relinquished.

DEL SOLE, J., FILES A DISSENTING MEMORANDUM STATEMENT.

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 00338 Harrisburg 1994

REDLAND SOCCER CLUB, INC.,

RICHARD V. SPONG, SR.,

RICHARD V. SPONG, JR., ET AL,

Appellants

v.

DEPARTMENT OF THE ARMY AND

DEPARTMENT OF DEFENSE,

Appellees

Appeal from the Order Entered May 5, 1994, in

the Court of Common Pleas of York County,

Civil, No. 92-SU-05339-01

BEFORE: CAVANAUGH, McEWEN, and DEL SOLE, JJ.

FILED JUL 14 1995

DISSENTING MEMORANDUM STATEMENT BY DEL SOLE, J.

My review of the record causes me to conclude that the trial court was correct in determining that no evidence exists of record to raise a factual issue that the plaintiffs were exposed to any actual chemical hazard. Therefore, I dissent and would affirm on the basis of the opinion and analysis of Judge John C. Uhler.

DEPARTMENT OF THE ARMY OF THE UNITED STATES OF AMERICA

and THE UNITED STATES OF AMERICA,

Appellees

Appeal from the United States District Court

for the Middle District of Pennsylvania

(D.C. Civil Action No. 90-cv-01072)

SUR PETITION FOR PANEL REHEARING

PRESENT: BECKER and HUTCHINSON, *Circuit Judges,* and JOYNER, *District Judge*•

The petition for panel rehearing filed by appellants in the above captioned matter having been submitted to the judges who participated in the decision of this court, and no judge who concurred in the decision having asked for rehearing, the petition for panel rehearing is denied.

By the Court,
/s/William D. Hutchinson
Circuit Judge

DATED JUL 13 1995

• Hon. J. Curtis Joyner, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

DEPARTMENT OF THE ARMY OF THE UNITED STATES OF AMERICA

and THE UNITED STATES OF AMERICA,
Appellees

Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil Action No. 90-cv-01072)
Present: Becker and Hutchinson, *Circuit Judges*, and Joyner*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel on June 22, 1994.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered on November 30, 1993, be, and the same is hereby affirmed with respect to the dismissal of claims of the Neighbors, the Soccer Plaintiffs and the Township Workers. The order of said District Court granting the United States summary judgment on Todd and Tracey Elliotts' claims is hereby reversed and the cause is remanded for further proceedings consistent with the opinion of this Court. The parties shall each bear their own costs. All of the above in accordance with the opinion of this Court.

ATTEST: /s/P. Douglas Sisk
Clerk

Dated: May 15, 1995
No. 93-7829
Certified as a true copy and issued in lieu
of a formal mandate on July 21, 1995.
Teste: /s/P. Douglas Sisk

Clerk, U.S. Court of Appeals for the Third Circuit.

Filed May 15, 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-7829

REDLAND SOCCER CLUB, INC., BRETNI BRINK, a Minor by TAMARA BRINK, RYAN BRINK, a Minor, by TAMARA BRINK, JOSEPH BRTALIK, CAROLE G. BRTALIK, JOSEPH J. BRTALIK, BRIAN BRTALIK, WENDY BRTALIK a Minor, by JOSEPH and CAROLE G. BRTALIK, THEODORE F. BURD, DIANE M. BURD. CHRISTOPHER T. BURD, a Minor, by THEODORE F. and DIANE M. BURD, GREGORY C. BURD, a Minor, by THEODORE F. and DIANE M. BURD, DEWITT J. CLINE, JR., JAN M. CLINE, ERIC J. CLINE, a Minor, by DEWITT J., JR. and JAN M. CLINE, JEROMY J. CLINE, a Minor, by DEWITT J., JR. and JAN M. CLINE, RONALD W. DANNER, DANIELLE M. DANNER, a Minor, by RONALD W. DANNER, CRAIG A. DANNER, a Minor, by RONALD W. DANNER, THEODORE J. ELLIOTT, FRANCES M. ELLIOTT, TODD ELLIOTT, a Minor, by THEODORE J. and FRANCES M. ELLIOTT, TRACEY ELLIOTT, a Minor, by THEODORE J. and FRANCES M. ELLIOTT. STEVEN W. HAAS, IRMA L. RODGERS-HAAS, ANTHONY M. RODGERS, a Minor, by STEVEN W. HAAS and IRMA L. RODGERS-HAAS, NICOLE C. RODGERS, a Minor, by STEVEN W. HAAS and IRMA L. RODGERS-HAAS, LAWRENCE E. HAGER, RUTH A. HAGER, SAMUEL HAGER, BENJAMIN HAGER, a Minor, by LAWRENCE and

RUTH HAGER, SHAWN HAGER, a Minor, by LAWRENCE and RUTH HAGER, EDWARD HOCKENBERRY, MARY L. HOCKENBERRY, BRETT R. HOCKENBERRY, a Minor, by EDWARD and MARY L. HOCKENBERRY, ROGER L. HOCKENBERRY, PATRICIA D. HOCKENBERRY, KERIC L. HOCKENBERRY, a Minor, by ROGER L. and PATRICIA D. HOCKENBERRY, KODI B. HOCKENBERRY, a Minor by ROGER L. and PATRICIA D. HOCKENBERRY, KLINT D. HOCKENBERRY, a Minor, by ROGER L. and PATRICIA D. HOCKENBERRY, DAVID G. HOOPER, PRISCILLA G. HOOPER, DAVID G. HOOPER, II, JOHN H. KNAUB, DEBORAH J. KNAUB, DEREK J. KNAUB, a Minor, by JOHN H. and DEBORAH J. KNAUB, SEAN M. KNAUB, a Minor, by JOHN H. and DEBORAH J. KNAUB, THOMAS R. KRAUSE, ROBERT A. KRAUSE, a Minor, by THOMAS R. KRAUSE, RICHARD H. LEBO, DONNA LEBO, TRISHA LEBO, a Minor, by RICHARD and DONNA LEBO, KRISTINA LEBO, a Minor, by RICHARD and DONNA LEBO, RALPH E. McCARTY, GALE P. McCARTY, JOSHUA H. McCARTY, a Minor, by RALPH E. and GALE P. McCARTY, LUCAS P. McCARTY, a Minor, by RALPH E. and GALE P. McCARTY, JAMES P. MEYERS, KIM MEYERS, SAMANTHA MEYERS, a Minor, by JAMES and KIM MEYERS, BRETT MEYERS, a Minor, by JAMES and KIM MEYERS, THOMAS M. MORROW, MEREDITH S. MORROW, GREGORY M. MORROW, a Minor, by THOMAS M. and MEREDITH S. MORROW, GEOFFREY T. MORROW, a Minor, by THOMAS M. and MEREDITH S. MORROW, JACK E. MUTH, KATHLEEN L. MUTH, ROBERT C. MUTH, a Minor, by JACK and KATHLEEN L. MUTH, JOHN A.

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Appellants

v.

DEPARTMENT OF THE ARMY OF THE UNITED STATES OF AMERICA and THE UNITED STATES OF AMERICA,

Appellees

Appeal from the United States District Court for the Middle District of Pennsylvania
(D.C. Civil Action No. 90-cv-01072)

Argued: June 22, 1994

PRESENT: BECKER and HUTCHINSON, *Circuit Judges*, and JOYNER, *District Judge*•

(Filed May 15, 1995)

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•Hon. J. Curtis Joyner, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

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OPINION OF THE COURT

HUTCHINSON, *Circuit Judge.*

Appellants are three groups of plaintiffs whose separate actions were consolidated by the district court because they all claimed they were harmed by exposure to toxic wastes appellee, the United States Army ("Army"), had deposited in lands once a part of the New Cumberland Army Depot ("Depot"). In all three cases, plaintiffs sought class certification, but the district court denied class certification.[1] One group of plaintiffs consists of workers for the township ("Township Workers") who converted the area the Army used as a landfill into a soccer field after the Army had transferred it to the township that adjoins the Depot. The second group consists primarily of residents living near the landfill (the "Neighbor Plaintiffs"). The third group are persons, primarily children, who played soccer (the "Soccer Plaintiffs") on the field created on the site of the Army's landfill. This third group includes two children of the Elliott family, Todd and Tracey (the "Elliotts"). Tracey suffers from leukemia and Todd from enlarged lymph nodes.

Except for the Elliotts, the primary relief all parties seek is medical monitoring. They appeal the district court's final order for the Army on all their claims, which was entered following orders granting the Army's motions for summary judgment. Their appeals raise several important issues. Ultimately, we will affirm the orders of the district court with respect to all appellants except the Elliotts, the only plaintiffs who have been able to produce evidence of actual harm by medical evidence showing the Elliott children are suffering from conditions that require medical attention beyond the medical services everyone in the general population should

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1. Basically, the named plaintiffs sought to include all persons exposed to any toxic substances the Army had deposited in the affected lands.

have. Our reasons, which differ somewhat from those of the district court, follow.[2]

I. *Factual History*

A. *The History of Marsh Run Park*

1. *NCAD's Use of the Land as a Landfill*

The New Cumberland Army Depot is located just east of the Harrisburg Airport on about 974 acres of land, between the Pennsylvania Turnpike to the south and some railroad tracks and the Susquehanna River to the north. From 1917 until the mid-1950's, the Depot used a fourteen-acre tract of land in its extreme southeastern part as a landfill to dispose of various wastes. The former landfill is bordered by a railroad embankment and the Susquehanna River to the north and by Marsh Run Creek ("Creek") and an access road on the south. A drainage pipe carrying storm water from the Depot once emptied out onto the western part of the tract. When the landfill was closed in the mid-1950's, Depot employees cov-

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2. We may summarily dispose of two of the arguments appellants raise on appeal. We hold that their argument that the district court abused its discretion when it denied class certification lacks merit and so will affirm the order denying class certification. We also reject appellants' argument that the district court erred in denying "Plaintiffs' Motion for Emergency Relief," relating to a discovery motion filed in a separate case. O'Neal v. United States, No. 1:CV-90-1073 (order filed Nov. 16, 1993). The district court had consolidated *O'Neal* with the instant case for discovery purposes. It held that counsel for the Depot correctly sought to preclude plaintiffs' counsel from contacting current or former Depot employees about the case without first complying with 32 C.F.R. §516.35(d). This regulation requires an individual seeking information from present or former employees of the Army to make the request in writing to appropriate Department of Defense personnel. It is known as the *Touhy* provision after *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951). The United States argues this order is not appealable because it was entered in a separate case not before the Court in these appeals. Because *O'Neal* was consolidated with *Redland* for discovery purposes, the United States also argues that the motion was untimely because discovery had ended and summary judgment had been entered in *Redland* on all issues but one when the court denied "Plaintiffs' Motion for Emergency Relief." Assuming that the order denying discovery in *O'Neal* is properly before us, we nevertheless hold that this argument also lacks merit.

ered the debris with eighteen inches of dirt taken from the bank of the Creek and then spread coal ashes over the landfill's surface, adding another six to seven inches of cover. The Depot's perimeter fence was moved westward so that the land, then known as Marsh Run Field, was no longer within the fence. The Depot remains adjacent to the west end of Marsh Run Field.

2. *Transfer of the Land to Fairview Township and Conversion Into a Soccer Field*

In 1970, an executive order directed the Army to identify and dispose of its excess acreage. The Depot identified its former landfill as excess and engaged in negotiations with adjoining Fairview Township ("Township") officials to transfer the former landfill to the Township for use as a public recreational area, which would include soccer fields. The land was formally transferred to the Township in 1976. According to both Army officials and Township employee, E. Robert McCollum ("McCollum"), it was common knowledge that the area was once used as a landfill by the Depot. Indeed, the tract was commonly referred to as "Pineapple Junction" because of old canned goods that were known to have been disposed of there. No one from the Depot or the Army informed the Township that the landfill contained potentially hazardous or toxic substances. Whether the Army knew the landfill was contaminated before the transfer is a point of contention.[3]

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3. This issue is the focus of plaintiffs' argument that the district court erred in holding that the government's deliberate process privilege justified the Army's refusal to disclose or discuss certain internal records. We discuss that issue *infra* in Part VIII of this opinion, where we conclude that the district court did not adequately explain the reasons for its ruling. We note there, however, that this discovery related not to the nature or toxicity of the substances the Army deposited in the landfill, the subject of other discovery and extensive testing, but rather to the Army's knowledge of their presence. That knowledge, or lack of it, seems to us to have little relevance to the plaintiffs' medical monitoring claim. *See also infra* footnote 20. We are thus satisfied that any error in this respect, if indeed the order refusing discovery, as opposed to the failure fully to explicate its rationale, is

In 1981, the Township began excavating and leveling the site, now known as Marsh Run Park ("Park"), for use as a soccer field. The soccer field was completed in 1982 and was used by the Redland Soccer Club from 1982 until the Park was closed on August 2, 1987.

3. *The Park Closure and Tests for Contamination*

In the 1960's and 1970's environmental concerns intensified in this nation. New laws and regulations reflected this growing concern, and the Army began investigating how wastes were disposed of at its facilities. The Depot was included. In 1972, the United States Army Environmental Hygiene Agency did a study on the Depot's wastewater discharges' effect on local streams and waters, including the Susquehanna River and the Creek, a stream which flows through the whole southern end of the Depot. This study concluded that the Depot's discharges had no apparent deleterious impact on the Susquehanna River, but that they did have "a significant, adverse impact" on the plant and animal life in the part of the Creek lying within the Depot's boundaries. In June of 1978, the Army recommended that the waters of the Creek within the Depot be closed to recreational use because low levels of polychlorinated biphenyls ("PCBs") had been detected in them.

Most of the environmental studies done at the Depot thereafter focused on lands within the Depot and excluded the closed landfill, which was no longer Depot property. In September of 1977, Depot officials discovered a document indicating a one-pound container of potassium cyanide, a toxic substance, had been buried in the landfill. Depot officials contacted the Township and asked for permission to dig it up

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erroneous, does not materially affect the parties' medical monitoring claims, which are the subject of the claims of all plaintiffs except the Elliotts, who also claim standard tort damages, including damages for pain and suffering.

and remove it. Depot officials were unable to locate any other documents detailing the contents of the landfill, and to date all its contents have not been identified.[4]

a. *Woodward-Clyde Soil Testing Report Dated July, 1987*

In 1986, the United States Army Corps of Engineers ("Corps") hired Woodward-Clyde Consultants ("Woodward-Clyde") to perform soil testing at the former landfill to see whether any contamination existed there. This was done pursuant to the Defense Environmental Restoration Account ("DERA"), a program established under 10 U.S.C.A. §2701 *et seq.* (West 1983), to investigate and remedy environmental contamination at former Department of Defense sites. The testing was done in March of 1987 when the field was still being used by the Redland Soccer Club.

The parameters of the study were determined by the Corps. Woodward-Clyde installed three monitoring wells surrounding, but not on, the landfill. It dug five test pits: one in the cut area on the northern edge of the Park to obtain background soils, one in the area of the cyanide canister burial and the remaining three on the field itself. The test pits in the field were four to five feet in depth. Two samples were removed from each pit, one near the surface and one at mid-depth. Surface soil samples were also taken, but not from the soccer field area. Groundwater was sampled in the monitoring

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4. A United States Army Environmental Hygiene Agency Interim Final Report (Draft) dated December 14-17, 1987, called Groundwater Contamination Survey at New Cumberland Army Depot, listed "damaged canned goods" as the major item for disposal along with "damaged, out-of-specification or empty containers from such materials as napalm thickener (aluminum naphthalate soaps), decontaminating agent noncorrosive, decontaminating solution DS-2) (sic), bleaches, and clothing impregnating compounds (acetylene tetrachloride or chlorinated aniline in a chlorinated paraffin binder)." Appellants' Appendix ("App.") at 1013a. A United States Environmental Protection Agency Report dated July 9, 1988 speculates that acids, solvents, fuels and plating solutions may also have been disposed of in the landfill.

wells, surface water was sampled at two locations along the site's boundaries and samples were obtained from in or near the Creek.

The testing demonstrated a "significant presence of contaminants in some areas" of the Park and contamination in most of the soil and sediment samples. Test pit soil samples contained organic contaminants and all surface soils contained elevated levels of petroleum hydrocarbons. Groundwater samples contained elevated concentrations of metals. Woodward-Clyde recommended further testing, including testing of the surface soils from the playing fields and surrounding areas "where fill is visible at the surface." Appellants' Appendix ("App.") at 950a. Following receipt of the Woodward-Clyde report, the Army and the Township, by mutual agreement, closed the Park to further public use and the Army repossessed the land in order to conduct additional testing.

b. *Corps' Public Health Evaluation Dated June 1988*

On May 25, 1988, nine months after the Park was closed to public use, the Corps sampled surface soils from seven areas on the soccer fields and one off site in an effort to determine whether the surface soils of the former landfill presented possible human health hazards. The samples were analyzed for the presence of volatile organic compounds ("VOCs"), semi-volatile organics, PCBs, metals and cyanide. In four of the eight locations low levels of polycyclic aromatic hydrocarbons ("PAHs") were detected. Lead was the only metal detected at levels significantly above those found in the off-site sample. The report considered exposure pathways of dust inhalation, skin contact and inadvertent ingestion of soil by hand-to-mouth contact. The Corps concluded that the sampling results showed "no apparent increase in health risk to the children playing at Marsh Run Park" because the concentrations of contaminants were within the acceptable limits pro-

posed by the United States Environmental Protection Agency ("EPA").

c. *EPA Soil and Groundwater Sampling Report Dated July 29, 1988*

On June 11, 1988, the Army determined that the former landfill was an appropriate site for a remedial investigation study, which was also to be performed by the Corps as part of the Defense Environmental Restoration Program. Meanwhile, EPA officials also decided to conduct soil and groundwater sampling at the Park and make a detailed magnetic survey. Surface samples were taken by EPA on June 22 and 23, 1988 at ten on-site locations, stratified soil samples at three locations and groundwater samples at three on-site monitoring wells. EPA concluded that the Park's surface soils were contaminated with lead and PAHs, its subsurface soils with lead and VOCs and its groundwater with VOCs. The magnetic survey showed three possible drum burial sites in the former landfill.

d. *EA Engineering Remedial Investigation Report Dated January 1990*

In conducting its remedial investigation, the Corps contracted with EA Engineering, Science and Technology, Inc. ("EA Engineering"). EA Engineering agreed to identify potential sources of contamination, define the nature and extent of site contamination and any immediate offsite impact to ground water, surface water and air, and to assess downstream ground water and surface water for human health and environmental risks. EA Engineering sampled waters from four nearby residential wells on August 31, 1989. It sampled ground water and soils from monitoring wells in two separate phases in February and August of 1989. The record does not contain the entire EA Engineering Remedial Investigation Report, and it does not indicate when EA Engineering took the Creek

surface water and sediment samples it analyzes in the Report. EA Engineering did not sample the Park's surface soils but instead used the results of the Corps' and EPA's surface soils testing in May of 1988. EA Engineering did not sample the waste fill itself but analyzed the surface soil and groundwater samples results to determine what contaminants might be flowing out from the waste fill.

EA Engineering concluded that the site was contaminated with PAHs but that the PAHs were not unique to the site. It concluded the site was also contaminated with trace metals including barium, lead, copper and silver. It also determined the fill was a potential source of VOCs. It found VOCs in the bedrock aquifer beneath the site and determined the source of this contamination was probably the fill. It found low-level VOCs discharging to the Creek upstream from and adjacent to the Park, but could not confirm whether this contamination was resulting from ground water flowing from the fill or from some other source. EA Engineering also concluded the trace metals were emanating partially from the fill and some other source. It found no contamination in any of the residential wells, all of which are hydraulically upgradient from the Park.

EA Engineering concluded that any contaminated ground water from the site would migrate north towards the Susquehanna River or flow into the adjacent Creek and that no residences are in the predicted migration path. It also concluded that the Creek's surface waters upstream from the Park contained low-level volatile contaminants trichloroethane and 1,1,2,2-tetrachloroethane, and that the upstream sediments contained low-level PAHs. The Creek's waters adjacent to and downstream from the Park contained low-level volatiles of trichloroethane and 1,2-dichlorothene. EA Engineering concluded that the source of these compounds was somewhere upstream, unrelated to the Park and that dust from

the surface soils was not a significant exposure pathway because the field, when tested, was covered by dense grass.

As for human health risk, EA Engineering concluded that "the past use of Marsh Run Field as a soccer field ... resulted in very little risk to the children using the field." App. at 1251a. It concluded that there would be potential health risk from any ingestion of on-site ground water, but that such ingestion would be highly improbable because it was unlikely any residential use would be made of the site in the future. Finally, EA Engineering concluded there was no risk to any of the nearby residents because their wells were not contaminated and would not become contaminated in the future. As for residents who may have eaten fish from the Creek, it concluded there was no carcinogenic risk.

B. *The Township Worker Plaintiffs*

The Township worker plaintiffs consist of seven individuals who either performed the excavation and levelling work while the former landfill was being converted into a soccer field or who mowed the grass and performed maintenance work at the Park after the field was constructed. Their deposition testimony and affidavits can be summarized as follows.

Sometime in 1980 or 1981, Fairview Township Engineer Robert G. Hartman ("Hartman"), was assigned the task of landscaping the former landfill for recreational use as a soccer field. He conducted a topographical and perimeter survey with a field crew. The Township Workers then excavated and levelled the land over a four month period during the summer of 1981.

When the Township Workers first arrived at the site, it was covered by brush and trees and was swampy in some areas. The Township Workers cleared the brush and trees and also removed what little topsoil was present at the site, which they put aside for later use. As they began to grade the site and

move earth from a higher section of land to the north, near the railroad tracks, to a lower section to the south in order to level the ground, they began to unearth "junk," including several barrels of white powder, drums, canisters, broken glass, old coffee mugs, utensils, cans, wood, a railroad rail and gas masks. One of the Township Workers recalled someone digging test holes into the junk area and taking samples from them. No one recalled any Army personnel being on site at any time during the work. As excavation continued, the junk was covered up and used as part of the fill for the lower area. The Township Workers estimated that a cap of an average of three feet of dirt from the higher area near the railroad embankment was placed over the junk. After the fill was levelled, the Township Workers placed on-site topsoil and topsoil from off-site over the fill to a depth of two to six inches. The field was then seeded. The Township Workers testified they inhaled dust, waded through dirt and debris, sat in the dirt and ate their lunch there over the four-month period. One Township Worker recalled that his eyes burned or stung while he was running the grader and tearing up new soil and that the burning did not stop until the newly torn up soil was reburied.

During the excavation and leveling work, some of these same Township Workers constructed a drainage swale to redirect water flowing out of a pipe carrying storm drainage waters out of the Depot. During excavation for the swale, the Township Workers exposed groundwater. Some of the Township Workers performed repairs on a bridge over the Creek and removed debris from the Creek.

A Township Worker named David A. Kupp ("Kupp") was responsible for mowing the field after it was constructed. He mowed once a week for approximately five hours, Kupp recalled the field as dry and only sparsely covered with grass and remembered the mower kicking up dirt and dust from the surface of the field about 20% of the time. He also spent

several hours painting the bridge over the Creek while he stood on the banks and rocks and in the waters of the Creek.

None of the Township Workers are currently suffering from any physical ailment that they claim is the result of their exposure. There is no evidence in the record that any of them have been examined for health problems related to their exposure at the Park or that any doctor has personally informed them that they have an increased health risk because of exposure to toxic substances while working at the Park.

C. *The Neighbor Plaintiffs*

The Neighbor Plaintiffs are twelve residents living in the immediate vicinity of the Park and the Creek, plus some relatives who regularly visited them. Some testified in depositions or affidavits that they waded in the Creek, fished in it and ate fish they caught there. Several testified they hunted in the former landfill area and ate pheasant, rabbit, squirrel or turtle they caught or shot there. Most of the Neighbors used the Park for walking or other forms of exercise.

On May 8, 1988, the Department of Environmental Resources ("DER") tested residential wells for trace metals and VOCs and found none of the wells were contaminated. One Neighbor, however, testified that her well water was tested in 1990 by her employer and found to contain high concentrations of several chemicals, including lead. Another Neighbor testified that he was told his well water did not pose a health risk but contained traces of contaminants. He and his family stopped drinking from it. None of the Neighbors are currently suffering from any illness as a result of their exposure, nor have any been personally advised by a doctor that they have an increased health risk as a result of such exposure.

D. *The Soccer Plaintffffs*

The remaining 128 plaintiffs are members of the Redland Soccer Association ("Redland"), adults and children who used

the Park on a regular basis from 1982 to 1987 for soccer activities, and members of their immediate families who were with them during activities at the Park. Some of the Soccer Plaintiffs testified they helped build the soccer field in 1982, picking rocks and moving dirt around the field and then raking and seeding it, setting goalposts and lining the field in order to get it ready for play in 1983. This took five or six weekends with about six hours work per day.

One of the Soccer Plaintiffs coached a team for Redland. He testified that his team, boys sixteen years old and under, practiced two to three hours, three times each week at the Park and played one game each weekend, half at the Park. He also coached a team for boys fourteen years of age and under. That team also practiced three times each week and played a game once every weekend during the season. Half of this team's games and practices were played at the Park.

Soccer's spring season started in April of each year and ended in early June. Its fall season began in mid-August and ended in mid-November. Practices were canceled if it rained, but games were played no matter what the weather conditions were. If water was on the field, someone would shovel the water away or throw sawdust on it. The soccer coach recalled several players falling into the drainage ditch that ran the length of the field, which was sometimes dry and sometimes wet. Each practice started with calisthenics.

The record contains excerpts from the depositions of two of the soccer players. One of them, a goalie, testified he often fell in the dirt around the goal area, sometimes face down in puddles one to two inches deep. He also testified he sometimes got dirt in his mouth that he had to spit out. Both players testified at times they went into the Creek to retrieve balls. None of the players except Todd Elliott and his sister, Tracy [sic] Elliott are alleging that they are currently suffering from

any ailment as a result of their exposure or that they have been personally advised by a doctor that they have an increased health risk due to their exposure.

E. *The Elliott Plaintiffs*

The Elliott plaintiffs include soccer player Todd Elliott and his younger sister, Tracey Elliott, as well as their parents. Todd played soccer at the Park and Tracey, while attending practices and games at the Park, skipped stones in a stagnant creek near the field, sat on the grass and ate food, crawled and ran on the field and walked through a mud-filled gully near the parking area. The Elliotts allege that as a result of Todd's and Tracey's exposure to contaminants at the Park, Tracey is suffering from acute lymphocytic leukemia and Todd suffers from enlarged lymph nodes and an increased risk of cancer.[5]

F. *The Parties' Expert Reports*[6]

1. *Plaintiffs' Risk Assessment*

The plaintiffs rely primarily on a report by Richard S. Greeley, Ph.D. ("Dr. Greeley") of R.E. Wright Associates, Inc. entitled "Public Health Risk Assessment of a Soccer Field Near the New Cumberland Army Depot, Fairview Township," dated January 24, 1992 ("Plaintiffs' Risk Assessment"). The Plaintiffs' Risk Assessment is limited to a study of the health risks for children and adults making use of the former landfill

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5. The Elliotts are also plaintiffs in an action against the Three Mile Island nuclear plant and allege their illnesses were caused by its release of radiation in March of 1978. *See Brinser v. Metropolitan Edison Co.*, No. 481-S-88 (Pa. Commw. Ct. filed Feb. 1988).

6. Because the parties on appeal do not dispute the admissability of any of the expert reports, we do not address the experts' qualifications or the reliability of their techniques or data, as otherwise required under our decisions *In re Paoli Railroad Yard PCB Litigation*, 35 F.3d 717, 742-49 (3d Cir. 1994) *("Paoli II")*, *cert. denied, General Electric Co. v. Ingram*, 1995 WL 75508 (Feb. 27, 1995), and *In re Paoli Railroad Yard PCB Litigation*, 916 F.2d 829, 855-859 (3d Cir. 1990) *("Paoli I")*.

as a soccer field. It does not address any health risks to the Township Workers from their excavation work or to the Neighbors from their recreational use of the Creek and their ingestion of fish and animals from the Creek and Park or water from residential wells.

The Plaintiffs' Risk Assessment contains the following summary:

> Surface soil samples and soil samples from excavation of test pits on the soccer field have shown that volatile and semi-volatile organic compounds and inorganic chemical compounds are present in the soil. Some of these compounds are carcinogenic and others can cause adverse non-carcinogenic health effects. The assessment considered health risks arising from four primary pathways of exposure of the soccer players, referees and coaches to contaminant chemicals in the soil: (1) ingestion of contaminated soil; (2) ingestion of contaminated water on or near the field; (3) inhalation of contaminated dust; and (4) dermal contact with the contaminated soil or water.
>
> The risk assessment was conducted based on U.S. Environmental Protection Agency risk assessment guidance documents.
>
> The results of the calculations indicate that participation in games or practices at the soccer field for periods of time greater than 33 hours results in significant health risks for both children and adults.
>
> The primary chemicals contributing to these risks are the inorganic chemicals arsenic and lead, and the base neutral polycyclic aromatic hydrocarbon benzo(a)pyrene. Other inorganic chemicals, polycyclic aromatic hydrocar-

bons, and semi-volatile organic compounds contribute lesser percentages to the risks.

App. at 2909a. The Report also states that increased risk may arise from absorption of chemicals through a cut, abrasion or perspiration, increased amounts of volatiles and dusts in the air during play and ingestion of contaminated soil or water during rough play when a player's face comes in contact with the ground.

In arriving at his conclusion that adults and children using the field for soccer play or practice for more than thirty-three hours were exposed to a significant health risk, Dr. Greeley relied on EPA's risk assessment procedure which consists of four steps: (1) data collection, evaluation and identification of chemicals of concern; (2) exposure assessment; (3) toxicity assessment and (4) risk characterization. Risk characterization involves, among other things, the calculation of carcinogenic risks, which are stated in terms of "risk per million" and is arrived at by multiplying the calculated "increased risk of cancer" by 1,000,000.[7] For each pathway of exposure, Dr. Greeley added together the cancer risks for each of the carcinogenic chemicals found at the site to derive an increased risk of cancer for each pathway. He then totalled the risks for each pathway to arrive at a total "increased risk of cancer,"

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7. No one points to any demographic, epidemiologic or any other type of scientific data, nor to any risk-utility analysis that supports EPA's million-fold regulatory factor as demonstrating the presence of a hazard, nor does this threshold appear in the regulatory or statutory history. Nevertheless, the million-fold factor seems ubiquitous in regulatory risk-utility determinations despite its indeterminate pedigree. We will assume that it has some rational basis and thus represents a regulatory determination to which we must defer in deciding plaintiffs' statutory claims. *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 897 (1984); *Federal Labor Relations Authority v. Dep't of Navy*, 966 F.2d 747 (1992). For purposes of simplicity, we will also use it to assess the tort claims. We note, however, that a common law court may still be free to apply standard tort risk-utility analysis to the problem of defining the threshold at which a toxic substance becomes a hazard.

which he defined as an increased risk of cancer due to exposure at the site against everyone's everyday risk of getting cancer.

Using the EPA guideline that treats an increased cancer risk which is greater than one in a million as "significant" and a similar guideline for non-carcinogenic health risks, Dr. Greeley concluded that children or adults playing or practicing soccer at the Park for thirty-three hours or more had an increased risk of cancer of one in a million and an increased risk of non-carcinogenic health problems of three in a million (children) and one in a million (adults). Children who played or practiced soccer at the Park for the maximum calculated exposure time of 1,350 hours had an increased risk of cancer of sixty-five in a million and of non-carcinogenic health risks of thirty-eight in a million. Adults with the maximum calculated exposure time had an increased risk of cancer of forty-six in a million and a non-carcinogenic increased health risk of eleven in a million.

In preparing his report, Dr. Greeley relied on the soil and groundwater sampling performed by Woodward-Clyde in March of 1988. Dr. Greeley also considered the soil and groundwater sampling results from the Corps' study performed in May of 1988 and the EPA study performed in June of 1988, but he decided to rely solely on the Woodward-Clyde results because of "the non-homogeneity of the landfill/soccer field soil, as well as the difficulty in attempting to correlate samples taken at different depths at different times by different sampling personnel." App. at 2921a. He reasoned that the Woodward-Clyde study was the most representative of the three, and its sampling was performed while the soccer field was still in use. He acknowledged, however, that Woodward-Clyde only dug three test pits within the immediate area of the former landfill, now the soccer field, and that the samples were not from the surface but were " 'near-surface' " samples and composite samples over the four-foot depth of the test pits.

Therefore, he concluded "[t]he actual concentrations of the chemicals of concern in the soil to which the soccer players and adults were exposed may vary more or less from the values selected for this risk assessment." App. at 2960a. He also considered and rejected additional exposure routes via ingestion or contact with the sediments in the marsh area adjacent to the soccer field and the surface water of the Creek because the concentrations of chemicals there were either below the detection limits of the testing method used or no larger than the concentrations in the test pit soils.

2. *Plaintiffs' Medical Monitoring Report*

The plaintiffs also rely on a report by Susan M. Daum, M.D. ("Dr. Daum") entitled "Medical Surveillance for Individuals Exposed to Hazardous Waste on Land Known as 'Marsh Run Park' in Fairview, Pennsylvania near the 'New Cumberland Army Depot' " ("Medical Monitoring Report") dated May 2, 1993. App. at 3006a. There, Dr. Daum states she relies on Dr. Greeley's Risk Assessment and agrees with Dr. Greeley that risk levels above one times the background rate of one case per million is medically significant. She refers to "the exposures which occurred from the ... Depot and waste disposal site, whether through well water, or recreational activities on/in contaminated soil," as having a risk estimate above one in a million but does not state where she obtained the risk estimate for well water exposure, in light of the fact that Dr. Greeley did not address well-water exposure in his Risk Assessment. App. at 3010a. Ultimately, Dr. Daum concludes that

> the examinations [she recommends] ... are not out of the ordinary, but consist of the usual adult medical examinations recommended for all adults with the adult risk of cancer in our society from those carcinogen exposures which are already prevalent. It is because of the increased

> risk of the exposures at the Marsh Run area, however, that such examinations become more urgent, and access to such examinations should not be left to vicissitudes of employment, health insurance contract, or other individual economic difficulties so prevalent in current health care delivery.

App. at 3008a. Therefore, Dr. Daum did not recommend any specialized tests for any of the plaintiffs but did recommend routine physical examinations and preventative programs.

3. *Plaintiffs' Contributing Contaminants Report*

Finally, the plaintiffs rely on a report by Richard C. Cronce, Ph.D. ("Dr. Cronce") of R.E. Wright Associates, Inc. entitled "Evaluation Contributions of Contaminants to the Fairview Township Soccer Field" ("Contributing Contaminants Report") dated May 19, 1993. App. at 3044. [sic] The purpose of the report is "to determine the possible pathways of migration of regulated compounds to the surface of the soccer field, thus exposing persons on the field to potential adverse health effects from these chemicals." *Id.* at 3044a. In preparing his report, Dr. Cronce reviewed the various Army reports on the site and also performed a "site walkover" to observe present on-site conditions. *Id.* at 3044. [sic] The report concludes that periodic additions of contaminants to the surface of the soccer field are likely as a result of flooding, overland flow of discharge waters from a drainage pipe adjacent to the field, erosion of top soil which is revealing an underlying layer of coal ash and movement of the contaminants inside the landfill up to the surface soil either by VOCs moving up through pore space in the soil or semi-volatile organic compounds moving upwards as a result of pedoturbation, or physical soil mixing, which occurs as animals or insects dig or burrow in the ground. Finally, Dr. Cronce concluded

that because some of the topsoil used on the field originated from a point along the Creek, it was probably contaminated.

Dr. Cronce did not perform any soil testing to confirm his hypotheses. He believed, however, that "[t]he presence of these contaminants on the existing surface has been documented and, therefore, the contribution of these contaminants from these various processes is highly likely." *Id.* at 3049a.

4. *Elliott Plaintiffs' Expert Report*

Finally, the record contains the affidavit of Peter W. Wright, M.D. ("Dr. Wright"), dated April 23, 1992 regarding plaintiff Tracy [sic] Elliott's acute lymphocytic leukemia and plaintiff Todd Elliott's enlarged lymph nodes. While preparing his report, Dr. Wright reviewed Tracy [sic] and Todd Elliotts' medical records as well as extensive scientific and medical literature regarding the causes of cancer and acute leukemias in particular. He concluded, "based on a reasonable degree of medical certainty, [that] the chemicals ... found at Marsh Run Park are known to cause cancer, and some have been specifically implicated with acute leukemias, such as that which has affected Tracy [sic] Elliott. App. at 2233a-34a. Dr. Wright further opined that "the acute lymphocytic leukemia of Tracey Elliott is related to her exposure to the [certain] chemicals[ ]" [and that] "Todd Elliott, ... due to his exposure to the [these] chemicals, is himself at increased risk of cancer." *Id.*

5. *Defendants' Expert Reports*

The defendants present a number of expert reports refuting plaintiffs' experts' conclusions and assumptions. Jessica Herzstein, M.D., M.P.H. ("Dr. Herzstein"), a physician specializing in occupational and environmental health, reviewed the Plaintiffs' Risk Assessment and the three soil sample analyses performed in 1987 and 1988. She concluded that no medical monitoring was necessary because the plaintiffs' ex-

cess risk for cancer was extremely low and the risks of such tests outweighed the benefits. Dr. Herzstein also produced an affidavit addressing Dr. Daum's Medical Monitoring Report and refuting its conclusion that medical monitoring was necessary for the same reasons given in her initial report. Defendants also produced an expert report by Martyn T. Smith, Ph.D. ("Dr. Smith"), a toxicology specialist, who also critiqued Plaintiffs' Risk Assessment and concluded that the actual excess cancer risk posed to the Soccer Plaintiffs was zero. Dr. Smith also concluded that Plaintiffs' Risk Assessment was flawed in the following respects: (1) it utilized unrealistic weather conditions; (2) it assumed an exceptionally high intake of surface water and soil; (3) it used test results from soil samples taken three to five feet below the surface; (4) it failed to take into account normal background levels of contaminants and (5) it used rodent studies for carcinogenic potency values, which are upper bound estimates of human potencies. Dr. Smith also produced an affidavit negating Dr. Greeley's response to his critique of the Plaintiffs' Risk Assessment.

James H. Jandl, M.D. ("Dr. Jandl"), a specialist in blood and blood disorders, reviewed Tracey Elliott's medical records as well as the existing literature and research in the fields of hematology and oncology and concluded that there is no medically recognized evidence linking acute lymphatic (lymphoblastic) leukemia to any chemical substances. He stated that the only known cause of this type of leukemia is exposure to ionizing radiation. He also reviewed Todd Elliott's medical records and concluded Todd has no medical problem with respect to his enlarged lymph nodes.

Roger Minear ("Minear"), Director of the Institute for Environmental Studies at the University of Illinois and Professor of Civil Engineering, conducted a detailed review of the available documents concerning the Army's use of the land as a landfill as well as the various soil studies and remedial

investigations reports undertaken by EPA and the Army and pertinent literature. He concluded that the landfill has not caused surface contamination at the soccer field and that plaintiffs' use of the subsurface soil test results to represent the surface conditions on the soccer field was not realistic or scientifically defensible. He also prepared a report critiquing Dr. Cronce's Contributing Contaminants Report, concluding that Dr. Cronce's hypothesized transportations of contaminants to the field has not been confirmed by any of the soil samples.

Finally, defendants rely on a report by Marilyn A. Hewitt, P.G. ("Hewitt"), a certified professional geologist and former Pennsylvania DER hydrogeologist. Hewitt reviewed Plaintiffs' Risk Assessment, as well as the soil test reports and other environmental investigation reports at the Park, maps, photographs, depositions and correspondence. She concluded that the exposure assumptions made in the Plaintiffs' Risk Assessment were not consistent with standard EPA protocols for evaluating human exposure to contaminants when the use of the contaminated property is recreational, such as a soccer field. She found the Plaintiffs' Risk Assessment was erroneous primarily because it utilized test results from soils as deep as three feet below the surface, whereas the standard EPA protocol called for use of surface soil samples no more than one foot deep. She also found the Risk Assessment failed to average the concentrations of contaminants in the soil samples and calculated the health risks using the maximum concentrations of contaminants, also contrary to standard EPA protocol. Therefore, she concluded that the Plaintiffs' Risk Assessment contained an inflated estimate of the health risks associated with the soccer field. She also examined Dr. Cronce's Contributing Contaminants Report and, using the available soil testing results, refuted Dr. Cronce's assumptions regarding contaminants being contributed from other contaminated areas of the

Creek or Depot. She refuted Dr. Cronce's conclusion that the surface soils were contaminated by upward transport by volitization of contaminants within the landfill based on the "insignificant" concentrations of such chemicals in the soils at the Park. App. at 3223a. Finally, Hewitt refuted Dr. Cronce's assumption that pedoturbation had caused mixing of the surface soils with the contaminated subsurface soils based on the fact that the surface soils were tested after the field had been closed for use as a soccer field.

Both Dr. Greeley and Dr. Cronce submitted affidavits responding to defendants' experts' critiques of their reports.

II. *Procedural History*

On June 7, 1990, five of the plaintiffs filed a class action complaint ("Redland complaint") seeking (1) injunctive relief and money damages under the Federal Tort Claims Act ("FTCA"), 28 U.S.C.A. §2671 *et seq.* (West 1994), for remedial action, medical monitoring and emotional distress ("Redland FTCA Plaintiffs"); (2) injunctive relief and response costs under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C.A. §9601 *et seq.* (West Supp. 1994), in the form of remedial action, medical monitoring and reimbursement of plaintiffs' litigation costs; (3) injunctive relief under the Pennsylvania Hazardous Sites Cleanup Act ("HSCA"), 35 Pa. Cons. Stat. §6020.101 *et seq.* (West 1993), in the form of remedial action, monetary damages and reimbursement of plaintiffs' litigation costs and (4) monetary damages for diminution of the Neighbors' property values based on trespass. On February 26, 1991, the Elliotts filed a complaint under the FTCA alleging negligence and seeking monetary damages for past and future medical expenses, pain and suffering, medical monitoring and litigation costs. The district court consolidated these cases on September 30, 1993.

The district court denied class certification for the Soccer Plaintiffs, Neighbors and Township Workers on March 4, 1991. After the plaintiffs' motion for reconsideration was denied on May 3, 1991, they filed an amended complaint joining an additional one hundred forty-five plaintiffs (collectively "Redland Plaintiffs") on August 26, 1991.

On December 12, 1991, the United States moved to dismiss plaintiffs' claims for medical monitoring and injunctive relief pursuant to Federal Rule of Civil Procedure 12(b)(6). On February 12, 1992, the district court granted the motion in part, and dismissed the Redland Plaintiffs' request for a medical monitoring fund under CERCLA. The court also dismissed all of the Redland Plaintiffs' FTCA claims requesting injunctive relief.

On March 27, 1992, the United States moved for dismissal of the Elliotts' complaint and for summary judgment. On June 23, 1992, the district court granted the motion in part and entered summary judgment in favor of the United States on all claims except medical monitoring, which it then left for trial.

On June 4, 1992, the United States moved for summary judgment or, in the alternative, partial summary judgment on the amended Redland complaint. On September 15, 1992, the district court granted the motion in part and dismissed the Redland plaintiffs' citizen suits under CERCLA and HSCA claims for lack of subject matter jurisdiction. The court also granted summary judgment to the United States and dismissed the Redland Plaintiffs' claims for attorneys' fees and experts' fees under CERCLA and for attorneys' fees under the HSCA. The court did not address the Redland Plaintiffs' entitlement to expert fees under HSCA. The court denied the United States' request for partial summary judgment based on

sovereign immunity, and denied the motion in all other respects.

On January 25, 1993, the United States moved to dismiss the Redland Plaintiffs' FTCA claims for lack of subject matter jurisdiction and, in a separate motion, asked, for summary judgment on all of the plaintiffs' claims for medical monitoring and emotional distress, including the Elliotts' medical monitoring claim. On June 1, 1993, all plaintiffs moved for partial summary judgment. On October 19, 1993, the district court denied the United States' motion to dismiss but granted its motion for summary judgment on all plaintiffs' medical monitoring and emotional distress claims and entered judgment against plaintiffs on those claims. It therefore denied plaintiffs' motion for partial summary judgment.

During the proceedings in the district court, the parties became embroiled in a number of discovery disputes which the district court resolved in the United States' favor and which plaintiffs now challenge on appeal. These include (1) an order dated January 14, 1991 denying plaintiffs' motion to compel discovery and sustaining the United States' objections to several interrogatories; (2) an order dated August 13, 1992 denying plaintiffs' motion to compel the production of one hundred thirty-nine documents and sustaining the United States' assertion of the Deliberative Process Privilege; (3) an order dated January 29, 1993 denying plaintiffs' motion to compel the production of five documents and sustaining the United States' assertion of the Deliberative Process Privilege; (4) an order dated March 4, 1993 granting the United States' motion for a protective order concerning plaintiffs' notices of deposition and (5) an order dated November 16, 1993 denying plaintiffs' motion for emergency relief concerning defense counsel's contact with former Army employees who were potential witnesses for the plaintiffs.

On November 29, 1993, the court entered final judgment in favor of the United States and against the plaintiffs. On December 23, 1993 plaintiffs filed a timely notice of appeal.

III. *Jurisdiction and Standard of Review*

The district court had subject matter jurisdiction pursuant to 28 U.S.C.A. §§1331, 1346 (West 1993) and 28 U.S.C.A. §2671 (West 1994), as well as CERCLA, 42 U.S.C.A. §9613(b) (West 1983). It had supplemental jurisdiction over the plaintiffs' state law claims pursuant to 28 U.S.C.A. §1367 (West 1993). We have appellate jurisdiction pursuant to 28 U.S.C.A. §1291 (West 1993).

In reviewing an order granting summary judgment, we exercise plenary review. Viewing the facts in the light most favorable to the nonmoving party, we look to see if there was a genuine issue of material fact; and, if not, whether the moving party was entitled to judgment as a matter of law. See Fed. R. Civ. P. 56; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986); *In re Paoli R.R. Yard PCB Litigation*, 916 F.2d 829, 860 (3d Cir. 1990) *("Paoli I")*.

We review *de novo* the district court's determination that the Redland Plaintiffs were not entitled to response costs under CERCLA and HSCA, including a health risk assessment, expert fees, attorney fees and other costs. *See United States v. Hardage*, 982 F.2d 1436, 1446 (10th Cir. 1992). Finally, we generally review the court's discovery rulings for abuse of discretion. *See Marroquin Manriquez v. I.N.S.*, 699 F.2d 129, 134 (3d Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984). Nevertheless, we exercise *de novo* review over the standards the district court used in exercising its discretion. We find an abuse of discretion only if there is either an interference with a substantial right or a gross abuse that could result in fundamental unfairness at trial. *Id.* (citations omitted).

IV. *Plaintiffs' Claims Under FTCA*

A. *Medical Monitoring*

We will first address the Redland FTCA Plaintiffs' argument that they presented sufficient evidence to the district court to withstand a motion for summary judgment on their FTCA claim that the Army's negligence entitles them to medical monitoring. In *Paoli I, supra,* we concluded that the Pennsylvania Supreme Court would recognize a cause of action for medical monitoring for plaintiffs who have been exposed to various toxic substances. *See Paoli I,* 916 F.2d at 852. In so concluding, we set forth four factors a plaintiff must prove in order to recover:

> 1. Plaintiff was significantly exposed to a proven hazardous substance through the negligent actions of the defendant.
>
> 2. As a proximate result of exposure, plaintiff suffers a significantly increased risk of contracting a serious latent disease.
>
> 3. That increased risk makes periodic examinations reasonably necessary.
>
> 4. Monitoring and testing procedures exist which make the early detection and treatment of the disease possible and beneficial.

Id. We stated that these factors must be proven by competent expert testimony. *Id.* (citation omitted). We did not, however, define the term "significantly exposed" or state what details an expert must testify to in order to establish it.

We recently revisited this issue in *In re Paoli Railroad Yard PCB Litigation,* 35 F.3d 717 (3d Cir. 1994), *(Paoli II), cert. denied, General Electric Co. v. Ingram,* 1995 WL 75508 (Feb. 27, 1995). There, we noted a New Jersey Supreme Court decision which held that plaintiffs seeking recovery for medi-

cal monitoring must " 'have ... experienced direct and hence discrete exposure to a toxic substance[.]' " *Id.* at 787 (quoting *Theer v. Philip Carey Co.*, 628 A.2d 724, 733 (N.J. 1993)). *Theer* held a plaintiff who was exposed to asbestos while laundering her husband's clothes could not bring a medical monitoring claim because, in part, "it was too difficult to quantify her exposure." *Id.* We noted our uncertainty regarding the impact of *Theer*, but believed Pennsylvania courts would not adopt such a narrow view of the cause of action. We reasoned that "[s]omeone indirectly exposed to one chemical might have as much risk of disease as someone directly exposed to another chemical[.]" *Id.* at 787-88. Accordingly, we declined to adopt a *"per se* rule requiring direct exposure, actual injury, and testimony about an individual's particular level of exposure." *Id.* at 788.

Nevertheless, we predicted that the Pennsylvania Supreme Court would set some limits on a medical monitoring claim, and we therefore adopted the Utah Supreme Court's holding in *Hansen v. CCI Mechanical, Inc.*, 858 P.2d 970, 980 (Utah 1993). We stated that:

> In order for a plaintiff to show significant exposure that causes a significantly increased risk to plaintiff of contracting a serious disease that makes periodic testing reasonably necessary, we think that a plaintiff must:
>
> prove that by reason of the exposure to the toxic substance caused by the defendant's negligence, a reasonable physician would prescribe for her or him a monitoring regime different from the one that would have been prescribed in the absence of that particular exposure. This is because under this cause of action, a plaintiff may recover only if the defendant's wrongful acts increased the plaintiff's incremental risk of incurring the harm produced by the toxic substance enough to warrant a change in the medical

> monitoring that otherwise would be prescribed for that plaintiff.
>
> *Hansen v. CCI Mech., Inc.*, 858 P.2d 970, 980 (Utah 1993). The court continued:
>
> > [I]f a reasonable physician would not prescribe it for a particular plaintiff because the benefits of the monitoring would be outweighed by the costs, which may include, among other things, the burdensome frequency of the monitoring procedure, its excessive price, or its risk of harm to the patient, then recovery would not be allowed.

Id. at 788. "Significant exposure," therefore, refers to an exposure which, either by duration or harm, is sufficient to cause a significantly increased risk, which in turn is sufficient to require a monitoring regime different from that normally required in the absence of such an exposure.

Here, in order to establish the first *Paoli I* factor of significant exposure, the district court reasoned that plaintiffs must show by clear evidence that they were actually exposed to toxins. The district court noted that "[t]here is, of necessity, a degree of speculation in a medical monitoring case. However, ... the allowable conjecture should be in regard to the amount or future effect of the exposure, not whether there was exposure at all." *Redland Soccer Club Inc. v. Dep't of Navy*, No. 90-1072, slip op. at 14-15 (M.D. Pa. Oct. 19, 1993). After reviewing plaintiffs' expert reports, the district court concluded that nowhere did plaintiffs' experts unequivocally state that plaintiffs had actually been exposed to any of the toxins alleged to be in the Park's soils or that any of the toxins had actually entered any of the plaintiffs' bodies. The district court's conclusion was based on plaintiffs' failure to present any evidence that the surface soils of the Park contained a level of contamination harmful to human beings.

The district court's analysis focuses perceptively on an issue we believe is central in all toxic tort cases; namely, the requirement that the alleged wrong create some significant risk of harm to the plaintiff. Thus, a plaintiff must not only show exposure, but must prove that he was exposed beyond what would normally be encountered by a person in everyday life, so that the plaintiff's risk of being injured from the exposure is greater, in some way, than the normal risks all of us encounter in our everyday lives. In *Paoli II*, we chose not to delve into the issues of how much exposure there had to be to equal "significant exposure," nor how "direct" the exposure must be. Instead, we simply required the plaintiff to prove indirectly the nature of the exposure by requiring him to show an "injury" (*e.g.*, a need for medical monitoring greater than that what is required by all persons).[8]

We do not believe, however, that the Redland FTCA Plaintiffs' failure to produce evidence, in the form of blood or

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8. The injury requirement is particularly important before a remedy such as medical monitoring is provided because the plaintiff's injury is only an increased possibility of harm rather than actual harm. *Paoli II's* requirement of "special" medical monitoring implicitly recognizes the longstanding requirement in all tort cases other than those based on the old "intentional" common law torts for various forms of trespass that a plaintiff must prove an injury before he may recover anything from a defendant. *See Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129, 1136 (5th Cir. 1985) ("An actionable tort, whether based on negligence or strict liability consists of two elements: a failure to act in accordance with the standard of care required by law and a resultant injury ... . However egregious the legal fault, there is no cause of action for negligence ... until there is 'actual loss or damage resulting to the interests of another.' ") (citations omitted). Otherwise, a polluter would become a health care insurer for medical procedures routinely needed to guard persons against some of the ordinary vicissitudes of life. It would convert toxic torts into a form of specialized health insurance. Imposition of liability on this basis seems to go beyond current tort theories of negligence or strict liability by requiring a polluter to pay for medical procedures that the general population should receive. Thus, *Paoli II* requires plaintiffs to show not only that their exposure to toxic substances is greater than normal background levels, but that the increased risk of injury from such exposure warrants medical monitoring against future illness beyond that which is recommended for everyone. *See Paoli II*, 35 F.3d at 788.

tissue tests, showing directly that they absorbed toxins from the field into their bodies is fatal to their claims. Defendants' own expert stated generally that there are no medical tests which could have detected the presence of the toxins found at the Park, and even if a test existed which could have detected a particular toxin, it would have been useful only if it were conducted within one hundred twenty days of the plaintiffs' exposure. App. at 82a. Requiring a plaintiff to produce this kind of evidence to support a finding of exposure to a toxic hazard would place an impossible burden on persons subjected to serious medical risk from toxic substances polluters have left to contaminate the environment and afflict the people who live near the wrongdoer's waste deposits. Thus, even without this direct evidence, we believe plaintiffs may still satisfy the first *Paoli I* factor through expert testimony showing they were exposed to the toxins at issue at levels significantly above their normal background presence so as to require special tests or more frequent medical monitoring than medicine recommends for the general population. With this in mind, we turn to the Redland FTCA Plaintiffs' expert reports to see whether any of them have produced evidence sufficient to survive summary judgment on their medical monitoring claims.

Surprisingly, we discover the record has no expert opinion on whether either the Township Workers or the Neighbors have been exposed to toxins to such an extent that they suffer such an increased risk of contracting a serious disease that supplemental medical testing is reasonably required. Of all the Redland Plaintiffs, the Township Workers who excavated and levelled the contaminated landfill for four months would appear to have the highest potential for significant exposure to toxins. Yet plaintiffs' experts virtually ignore them, as well as the Neighbors, and focus their expert opinion almost exclusively on the soccer players, who would seem to have suffered

a more limited risk of significant exposure, given the paucity of evidence in this record showing there were harmful quantities of contaminants in the surface soils of the playing field. Our review of the expert reports presented by the parties, as well as the soil testing analyses, indicates that the subsurface of the landfill was contaminated; but neither the EPA's nor the Corps' surface soil test results indicate contamination in the surface soil above background levels. It is undisputed that the soccer players' primary exposure for any substantial length of time was only to the surface soils on the soccer field. Without evidence showing that the surface was contaminated, the Soccer Plaintiffs cannot show significant exposure.

Dr. Greeley's report relies solely on the Woodward-Clyde soil samples which were taken at some depth below the surface of the Park, and he acknowledges that the exposure values selected for use in the risk assessment may vary from the actual concentrations in the soil. Nevertheless, we believe that Dr. Greeley's report, as well as Dr. Cronce's report in which he concluded that contaminants from the subsurface could migrate upwards into the surface and that flooding of the Creek could spread contaminants on the surface, permit a reasonable factfinder to infer that adults and children using the soccer field for thirty-three hours or more were exposed to carcinogens and non-carcinogens that increased their risk of illness beyond the one-in-a-million benchmark the EPA uses to measure significant risk.[9]

Turning to the Redland FTCA Plaintiffs' evidence concerning special medical monitoring, the only expert report concerning the need for and extent of medical monitoring is

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9. We, again note, however, that Dr. Cronce's report is not based on any study quantifying the actual effects of this hypothetical migration. We also note again that EPA's basis for its use of the one-in-a-million lifetime ratio to judge significant exposure is not readily apparent. Nevertheless, we will assume a rational basis for EPA's one-in-a-million standard in defining "significant" risk. *See supra* footnote 7.

that of Dr. Daum. She expressly states that she does not recommend special testing for any of the plaintiffs:[10]

> I emphasize ... that the examinations suggested [below] are not out of the ordinary, but consist of the usual adult medical examinations recommended for all adults with the adult risk of cancer in our society .... It is because of the increased risk of the exposures at the Marsh Run area, however, that such examinations become more urgent, and access to such examinations should not be limited to vicissitudes of employment, health insurance contract, or other individual economic difficulties ... .

She acknowledges the considerable limitations of the currently known examinations and tests for the early detection of cancer, as well as the fact that some, such as lung cancer screening, create risks that outweigh the potential benefits. She also declines to recommend any specific surveillance tests for any other non-cancerous chronic diseases, for the same reasons. (App. 3011 [sic]).

Thus, because all the Redland FTCA Plaintiffs (the Township Workers, the Neighbors and the Soccer Players) failed to introduce evidence that their exposure required a different medical monitoring regimen than that which would normally be recommended for them absent exposure, under *Paoli II*, we will affirm the district court's order granting summary judgment to the United States on the Redland FTCA Plaintiffs' medical monitoring claims.

B. *Emotional Distress*

The Redland FTCA Plaintiffs also seek to recover damages for negligent infliction of emotional distress caused by

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10. Dr. Daum does not distinguish between the different groups of Redland Plaintiffs. Rather, she refers simply to them as the "individuals" exposed to contaminants at the Park. App. at 3006a.

their exposure to chemicals at the Park. The record shows that none of the Redland FTCA Plaintiffs currently suffer a physical injury or a medically-identifiable effect from any exposure to chemicals at the Park. Therefore, we conclude the district court did not err in granting summary judgment to the United States on this aspect of plaintiffs' claim. Absent some physical injury or impact, Pennsylvania's governing law does not provide recovery for negligent infliction of emotional distress. *See Wisniewski v. Johns-Manville Corp.*, 759 F.2d 271, 274 (3d Cir. 1985) (citing *Cathcart v. Keene Indus. Insulation*, 471 A.2d 493, 508 (Pa.Super. Ct. 1984)); *see also Bubash v. Philadelphia Elec. Co.*, 717 F. Supp. 297, 300 (M.D. Pa. 1989) (mere exposure not equivalent to physical injury).

We also believe the district court correctly distinguished *Merry v. Westinghouse Elec. Corp.*, 684 F. Supp. 847 (M.D. Pa. 1988). There, the court held that plaintiffs' emotional distress claims survived Westinghouse's summary judgment motion because the plaintiffs' experts testified that plaintiffs suffered a present "physical effect as a result" of exposure to contaminated well water and that some plaintiffs "demonstrated acute physical symptoms of exposure to the chemicals." *Id.* at 852. We have no such expert evidence here. Therefore, summary judgment against the Redland FTCA Plaintiffs on their emotional distress claims was appropriate.[11]

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11. The Redland FTCA Plaintiffs also argue the district court erred in dismissing their FTCA request for remedial action under CERCLA and HSCA. This remedy is not available against the United States under FTCA, and we will affirm the district court's order dismissing it. *See, e.g., Hatahley v. United States*, 351 U.S. 177, 182 (1956) (district court did not possess power under FTCA to enjoin United States); *Moon v. Takisaki*, 501 F.2d 389, 390 (9th Cir. 1974) (per curiam) (FTCA does not submit United States to injunctive relief). Accordingly, we need not, and do not consider whether the district court correctly denied the Redland FTCA Plaintiffs' motion for summary judgment on their claim of negligence *per se* against the United States.

V. *The Redland Plaintiffs' Claims Under CERCLA*

We turn next to the Redland Plaintiffs' argument that the district court erred in dismissing their claims for response costs, including attorneys fees, expert witness fees and health risk assessment costs, under CERCLA. We conclude that the district court correctly dismissed these response cost claims.[12]

Although the Redland Plaintiffs acknowledge the existence of an ongoing remedial action at the site, they contend that the remedial action "is not even attempting to address the health risks created by the contaminated site," and therefore their request for expert fees, costs of health risk assessments and other costs are not "challenges" to the remedial action. Brief for Appellants at 17. They also contend their action is an action for response costs, which is not subject to CERCLA's prohibition against private remedial actions. *See* 42 U.S.C.A. §9613(h) (West Supp. 1994).

Under CERCLA, there are at least two theories on which a private individual can base an action for response cost. First, a person who has incurred response costs that were necessary and consistent with the national contingency plan ("NCP"), has a private right of action under 42 U.S.C.A. §9607(a)(4)(B) (West Supp. 1994). Second, any person may bring a civil action on his own behalf in the proper district court against any

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12. Initially, we note that the Redland plaintiffs also contend that the district court erred in dismissing their claim for medical monitoring under CERCLA. We believe that the elements of a claim for medical monitoring under CERCLA and HSCA are the same as the elements for a common law medical monitoring claim set out in *Paoli I* and *Paoli II*. Because of our conclusion that the Redland FTCA Plaintiffs failed to introduce sufficient evidence to survive a summary judgment motion on their FTCA medical monitoring claim, we need not and do not address whether they could recover medical monitoring costs from the United States as a "response cost" under CERCLA or HSCA. We also note that the United States Supreme Court recently held that attorneys fees are not recoverable as response costs under CERCLA. *See Key Tronic Corp. v. United States*, 114 S. Ct. 1960, 1967 (1994). Thus, as the Redland Plaintiffs concede, we must affirm the district court's order dismissing their request for attorneys fees under CERCLA.

person, including the United States or its agencies, for violations of CERCLA or against the President or the Administrator of EPA for their failure to perform any act or duty arising under CERCLA. *See* 42 U.S.C.A. §9659(a) (West Supp. 1994); *see also Key Tronic Corp.*, 114 S. Ct. at 1965-66.

The district court's jurisdiction over such actions is limited as follows:

> No Federal Court shall have jurisdiction under Federal law other than under section 1332 of Title 28 (relating to diversity of citizenship jurisdiction) or under [relevant] State law ... to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title, in any action except one of the following:
>
> (1) An action under section 9607 of this title to recover response costs or damages or for contribution.
>
> ...
>
> (4) An action under section 9659 of this title (relating to citizen suits) alleging that the removal or remedial action taken under section 9604 of this title or secured under section 9606 of this title was in violation of any requirement of this chapter. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site.

42 U.S.C.A. §9613(h)(1), (4) (West Supp. 1994).[13]

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13. The Redland Plaintiffs argue the district court incorrectly limited its analysis to section 9613(h)(1), (4) in dismissing their CERCLA claims. Nevertheless, when we look to section 9659, we see that the issues still to be decided on this appeal do not involve either of the kinds of claims that can support a citizen's suit alleging a removal or remedial action undertaken or secured by or through EPA. The Redland Plaintiffs do not contend otherwise. Therefore, we focus our analysis on the first exception to section 9613(h).

The absence of a definition of "response costs" has been the source of much litigation since CERCLA's enactment. The terms "response" and "respond" are defined as "remove, removal, remedy, and remedial action," including enforcement activities. 42 U.S.C.A. §9601(25) (West Supp. 1994). " '[R]emedial action' means those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances ... ." 42 U.S.C.A. §9601(24) (West Supp. 1994) (in relevant part). The terms "remove" or "removal" means:

> the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release.

42 U.S.C.A. §9601(23) (in relevant part).

We do not believe the Redland Plaintiffs' litigation costs are "response costs" under any of these definitions. The health risk assessment and expert testimony were designed to assess, for litigation purposes, what health risks, if any, the plaintiffs were exposed to while using the Park for recreation. The expert assessments were conducted long after the Park was closed to recreational use and have nothing to do with any remedial or response action at the Park itself. Moreover, under section 9607, plaintiffs may only recover response costs which

are necessary and consistent with the NCP. *See* 42 U.S.C.A. §9607(a)(4)(B). The heart of these definitions of removal and remedy are "directed at containing and cleaning up hazardous releases. ... [T]herefore[,] ... 'necessary costs of response' must be necessary to the containment and cleanup of hazardous releases." *United States v. Hardage*, 982 F.2d 1436, 1448 (10th Cir. 1992) (health assessments conducted by experts retained for litigation purposes not response costs under section 9607(a)(4)(B)), *cert. denied, Advance Chemical Co. v. U.S.*, 114 S. Ct. 300 (1993); *see Cook v. Rockwell Int'l Corp.*, 755 F. Supp. 1468, 1476 (D. Colo. 1991) ("A plaintiff who has incurred no costs, except for litigation expenses, prior to the filing of CERCLA action has incurred no 'necessary costs of response' under §9607(a)."); *Ambrogi v. Gould, Inc.*, 750 F. Supp. 1233, 1246 (M.D. Pa. 1991) (health assessments not recoverable response costs under CERCLA). Therefore, we do not believe the district court erred in determining that plaintiffs' costs are not response costs because they are not "monies ... expended to clean up sites or to prevent further releases of hazardous chemicals." *Redland Soccer Club Inc. v. Dep't of Navy*, No. 90-1073, slip op. at 5 (M.D. Pa. Sept. 15, 1992).[14]

VI. *Summary Judgment Against Elliotts*

Finally, we consider the Elliotts' claims. They challenge the district court orders dismissing their FTCA negligence claim against the Army in which they seek damages for medical monitoring, past and future medical expenses, pain and suffering and emotional distress. The district court held that the

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14. The Redland Plaintiffs also argue that the district court erred in dismissing their citizen suits for injunctive and remedial relief, as well as attorneys fees, expert fees and health risk assessment costs under HSCA. In view of our disposition, we need not decide that issue. We note, however, that the test of HSCA is markedly different from that of CERCLA. We express no opinion, however, about any claim for medical monitoring under state law.

Elliotts, like the other plaintiffs, had produced no evidence they were actually exposed to chemicals at the Park. We concluded in Section IV.A. that there is enough evidence to create a genuine issue of material fact as to whether persons using the Park for thirty-three hours or more had enough exposure to carcinogens and non-carcinogenic toxins to create a significant risk to their health. Nevertheless, we affirmed the district court's order granting summary judgment to the government on the claims of the Township Workers, the soccer players and the Neighbors for medical monitoring because they had failed to show that their exposure made any medical monitoring tests or examinations necessary or desirable other than those that health care professionals recommend for people who have had no exposure to any of the toxic substances that might be found at the Park.

The Elliotts' case differs in a striking respect from the other plaintiffs in this action: Tracey Elliott suffers from leukemia and Todd Elliott suffers from enlarged lymph nodes. None of the other Redland Plaintiffs show any signs of physical injury from their exposure. Accordingly, the Elliotts have shown harm because the illnesses of their children demonstrate an immediate need for medical monitoring beyond that which is recommended for the general population. Still, neither their common law tort claim nor any of their statutory claims can survive unless they establish their exposure is the cause of their increased medical needs. The district court held that Dr. Wright's statement that the Elliott children's illnesses were "related to" their exposure to the health hazards at the Park that resulted from the Army's deposit of toxic substances there was insufficient to show causation under applicable Pennsylvania law. We believe the conclusion that the Elliotts have failed to show causation, as a matter of law, should not have been made at this stage of the proceeding on the record before the district court.

In order to establish a traditional tort claim for negligence under Pennsylvania law, the Elliotts must establish that the Army's failure to exercise reasonable care towards them and any breach of its duty exposed them to an elevated risk of foreseeable harm, which resulted in injury.[15] *Mohler v. Jeke*, 595 A.2d 1247 (Pa. Super. Ct. 1991). On this record, we think the question whether the Elliotts can successfully establish all these elements of their claim is a question of fact, not law. At this stage, we look only to see if the Elliotts have introduced enough evidence to create a genuine issue of material fact as to each of these elements, including causation, the only one still at issue. For the following reasons, we conclude they have.

We note initially that "cause in fact," or physical cause, is not the same as "proximate cause," or legal cause, and that both must be shown. *See Bell v. Irace*, 619 A.2d 365, 367 (Pa. Super. Ct. 1993); *Novak v. Jeanette Dist. Mem. Hosp.*, 600 A.2d 616, 618 (Pa. Super. Ct. 1991). Causation in fact is normally a question for the jury, but proximate cause poses questions of law which require the court to determine whether the defendant's negligence was so remote that, as a matter of law, he cannot be held liable for the harm which subsequently occurred. *See Bell*, 619 A.2d at 36; *Novak*, 600 A.2d at 618. Of course, under Pennsylvania law, the exposure must appear to contribute "substantially" to the Elliotts' injuries, but this is an

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15. The parties agree that Pennsylvania law governs all state law issues in this case. We believe causation is an issue that should be determined by state law on all the theories of recovery the Elliotts assert. *Paoli II*, 35 F.3d at 717. Like the district court, we recognize that violation of a statute or administrative regulation may be negligence *per se*, and therefore a higher degree of care may be required in handling dangerous or toxic materials. The principles of negligence *per se* aid plaintiffs in establishing a breach of duty, but they do not avoid the issue of causation. The basic elements of any negligence claim remain a duty, breach of the duty, actual loss or harm and a causal connection between the breach and the harm. *See Casey v. Geiger*, 499 A.2d 606, 612 (Pa. Super. Ct. 1985).

issue of degree that is usually a question for the factfinder.[16] *See Paoli II*, 35 F.3d at 761 n.31 (citing *Hamil v. Bashline*, 392 A.2d 1280, 1284 (1978) (discussing Pennsylvania's "substantial" factor requirement on proving causation).

The district court believed that Dr. Wright's statement that the Elliott children's illnesses was "related to," rather than "caused by," any assumed exposure failed to show a causal connection between Tracey's exposure and her leukemia. It relied on *Novak v. United States*, 865 F.2d 718 (6th Cir. 1989), in rejecting Dr. Wright's report and thus analyzed Dr. Wright's report in terms of proximate cause, rather than "but for" cause or causation in fact. In *Novak*, an expert testified that plaintiff's death was "related" to a swine flu vaccination he received. *Id.* at 720. This medical opinion was based on the expert's assumption that the disease plaintiff suffered was caused by a virus. Tellingly, "no witness for the plaintiff could say with scientific or medical certainty that the particular vaccine at issue ... caused [plaintiff's] disorder." *Id.* at 722. Considered along with the defendant's expert testimony that there was no scientific evidence that the vaccine was related to the cause of plaintiff's illness, the United States Court of Appeals for the Sixth Circuit concluded that the district court clearly erred in upholding a finding of causation and entering judgment for the plaintiff. *Id.*

On this appeal, however, we are reviewing the Elliotts' claims at the summary judgment stage, and on that basis alone *Novak* is distinguishable. Whether Dr. Wright's testimony will persuade the factfinder that leukemia is caused by toxins of the type found at the Park remains to be seen. For summary judgment purposes, however, we believe that the Elliotts have

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16. Of course, if it could be shown, by cross-examination or otherwise, that Dr. Wright used the term "relation" to mean "correlation" in the statistical sense instead of cause in either the medical or legal sense, the force of his testimony could be significantly affected.

introduced sufficient evidence to establish a genuine issue of material fact regarding causation. Dr. Wright testified:

> It has been stated in a standard text of oncology that irradiation and exposure to toxic chemicals are the most studied environmental factors that predispose to leukemia. In another standard text of cancer epidemiology, it has also been stated that the probable causes of leukemia include a range of factors, acting singly or in combination, some involving intrinsic host mechanisms and others reflecting environmental exposures, including radiation, chemicals and others.

App. at 2190a. Dr. Wright continued:

> Some of the chemicals found on [NCAD] includ[ing] ... but not restricted to arsenic, cadmium, trichloroethylene, chloroform, DDT, PCBS, carcinogenic PAHs, hexachlorobenzene, radium, and pentachlorophenol.
>
> Lymphoreticular malignancies in humans have been linked to exposure to benzene, chloroform, chlorophenols, and trichloroethylene. Animal studies have also supported a causal relationship between exposure to trichloroethylene, DDT, and benzene and lymphoreticular malignancy in animals. A positive statistical association of childhood leukemia and well water contaminated with chlorinated organics, including trichloroethylene chloroform has been reported. An increased leukemia mortality has been attributed to occupational exposure to chemicals, including organic solvents, and chlorophenols, all chemicals known to be present at Marsh Run Park.

Id. at 2191a. In contrast to *Novak*, Dr. Wright also testified, "based upon a reasonable degree of medical certainty," some of the chemicals at the Park cause cancer, including acute

leukemia, and Tracey Elliott's disease is related to her exposure at the Park. *Id.* at 2233a.[17]

Under *Paoli II*, 35 F.3d at 750-52, the requirement of expert testimony on issues of the type involved here is a matter of substantive law governing a plaintiff's burden of proof. However, Pennsylvania caselaw on causation does not require that expert testimony include any "magic words" such as "caused by," rather than "related to." To the extent that "magic words" have any significance in the Pennsylvania cases, they seem merely to reflect Pennsylvania's sensible requirement that the expert speak "with a reasonable degree of medical certainty." In *Gradel v. Inouye*, 421 A.2d 674, 679 (Pa. 1980), for example, the Supreme Court of Pennsylvania held:

> Expert medical opinion on causation need not be unqualified and absolute, i.e., stated in 'categorical terms;' ordinarily, it must establish that the injury was, to a 'reasonable degree of medical certainty,' caused by the alleged negligence.
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> [When] the complexities of the human body place questions as to the cause of pain or injury beyond the knowledge of the average layperson ... the law requires that expert medical testimony be employed. In addition to its bearing on whether or not the defendant's conduct was negligent, such testimony is needed to establish that the injury in question did, with a reasonable degree of medical certainty *stem from* the negligent act alleged.

Id. (quoting *Hamil v. Bashline*, 392 A.2d 1280, 1285 (Pa. 1978) (emphasis omitted from original and added)). We believe Dr.

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17. Of course, if it could be shown, by cross-examination or otherwise, that Dr. Wright used the term "relation" to mean "correlation" in the statistical sense instead of cause in either the medical or legal sense, the force of his testimony could be significantly affected.

Wright spoke with the "reasonable degree of medical certainty" required by Pennsylvania caselaw.

The district court also concluded that Dr. Wright's report did not sufficiently "rebut" the affidavit submitted by the Army's expert, Dr. Jandl, stating that leukemia is not caused by the types of chemicals found at the Park and that Tracey's leukemia and Todd's enlarged lymph nodes therefore cannot be causally linked to their exposure. Dr. Wright's report stated that Tracey Elliott's leukemia is related to her exposure to the chemicals found at the Park and that Todd Elliott has an increased risk of cancer due to his exposure to the same chemicals. It also states that exposure to certain chemicals, including those found at the Park, is among the risk factors associated with leukemia. Dr. Wright and Dr. Jandl simply reached different conclusions regarding the cause of the Elliott children's injuries after reviewing the Elliotts' medical records. Because their opinions conflict as to the fact of causation, there remains a genuinely disputed issue of material fact on the issue of causation, which is for the factfinder to resolve. It is up to the jury to decide whether the chemicals at the Park were a substantial contributory cause of the Elliott children's illnesses. Viewing the evidence in the light most favorable to the Elliotts, the nonmoving party, we believe Dr. Wright's report is enough to permit the Elliotts to survive the United States' motion for summary judgment on the issue whether Todd and Tracey Elliotts' present injuries, including any need for special medical monitoring, have been caused by their exposure to any toxic substances the Army may have deposited in the landfill under the Park in which they played.

VII. *Discovery Disputes*

Because we will reverse the district court's order granting summary judgment to the United States on the Elliotts' claims, we must consider the discovery issues the appellants raise

concerning the district court's decision that the deliberate process privilege enabled the United States to withhold discovery of certain documents that could be relevant or likely to lead to the discovery of relevant information. The plaintiffs appeal three discovery related orders, issued by the district court, which denied their motions to compel production of documents.[18]

A. *The Deliberative Process Privilege*

First, the plaintiffs allege that the district court's order, dated August 13, 1992, denying their motion to compel production of one hundred thirty-nine documents based upon the defendants' deliberative process privilege, was an abuse of discretion. The deliberative process privilege permits the government to withhold documents containing "confidential deliberations of law or policymaking, reflecting opinions, recommendations or advice." *In re Grand Jury*, 821 F.2d 946, 959 (3d Cir. 1987) (citing *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-54 (1975); *EPA v. Mink*, 410 U.S. 73, 89 & n.16 (1973)), *cert. denied sub. nom., Colafella v. United States*, 484 U.S. 1025 (1988).[19]

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18. The plaintiffs also challenge the district court's order, dated March 4, 1993 granting the defendants' motion to require the plaintiffs to travel to the residence or place of business of certain witnesses who were sought to be deposed. The plaintiffs contend that it was an abuse of discretion to require them to send an attorney there to conduct the depositions and that the district court should have ordered the depositions to occur at the site of the litigation. In the end, the plaintiffs deposed these individuals by phone and so did not incur the travel expense to which they objected. The plaintiffs now claim this was unfair because they were unable "to evaluate the appearance and conduct of [the] witnesses." Reply Brief of Appellants at 22. We cannot say, based on this generalized complaint, that the district court's order was an abuse of discretion. *See Marroquin-Manriquez v. I.N.S.*, 699 F.2d 129, 134 (3d Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984) (a district court has broad discretion in determining the manner in which discovery is conducted.).

19. Our discussion of the deliberative process privilege is based, in part, on interpretations of the bank examination privilege. The two privileges are similar and precedent concerning them is often relied upon interchangeably. *See, e.g., Schreiber v. Society for Savings Bancorp, Inc.*, 11 F.3d 217, 220-22 (D.C. Cir. 1993);

"[T]he ultimate purpose of this long-recognized privilege is to prevent injury to the quality of agency decisions." *Sears, Roebuck & Co.*, 421 U.S. at 151. It recognizes "that were agencies forced to operate in a fishbowl, the frank exchange of ideas and opinions would cease and the quality of administrative decisions would consequently suffer." *First Eastern Corp. v. Mainwaring*, 21 F.3d 465, 468 (D.C. Cir. 1994) (quotations and internal ellipses omitted). The deliberative process privilege does not protect factual information, even if such information is contained in an otherwise protectable document, as long as the information is severable. *See In re Grand Jury*, 821 F.2d at 959. In addition, it does not protect "[c]ommunications made subsequent to an agency decision." *United States v. Farley*, 11 F.3d 1385, 1389 (7th Cir. 1993).

The privilege, once determined to be applicable, is not absolute. *First Eastern Corp.*, 21 F.3d at 468 n.5; *Farley*, 11 F.3d at 1389. After the government makes a sufficient showing of entitlement to the privilege, the district court should balance the competing interests of the parties. The party seeking discovery bears the burden of showing that its need for the documents outweighs the government's interest. This Court has previously stated that "the party seeking disclosure may overcome the claim of privilege by showing a sufficient need for the material in the context of the facts or the nature of the case ... or by making a *prima facie* showing of misconduct." *In re Grand Jury*, 821 F.2d at 959 (internal citations omitted). The United States Court of Appeals for the District of Columbia, recently determined that a district court, in balancing the interests, should consider at least the following factors: "(i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the 'seriousness' of the

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In re Subpoena Served Upon the Comptroller of the Currency and the Secretary of the Board of Governors of the Federal Reserve System, 967 F.2d 630, 634 (D.C. Cir. 1992).

litigation and the issues involved; (iv) the role of the government in the litigation; [and] (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable." *First Eastern Corp.*, 21 F.3d at 468 n.5.

Thus, a party's assertion of the deliberative process privilege requires a two-step review in the district court. First, it must decide whether the communications are in fact privileged. Second, the court must balance the parties' interests. Because the district court did not sufficiently explain its rationale in either respect, we will vacate its order of August 13, 1992 denying the plaintiffs' motion to compel discovery of the 139 documents which the Army claimed the deliberative process privilege.[20] On remand, the district court should demonstrate its adherence to the process.

The initial burden of showing privilege applies is on the government. *See Schreiber v. Society for Savings Bancorp.*, 11 F.3d 217, 221 (D.C. Cir. 1993). To meet it, the government must present more than a bare conclusion or statement that the documents sought are privileged. *Id.* Otherwise, the agency, not the court, would have the power to determine the availability of the privilege. *Id.*

The United States, in support of its assertion of the deliberative process, initially gave the district court a list and description of fifty-nine requested documents which plaintiffs had requested with supporting affidavits. There it states that

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20. Our remand on these discovery related orders does not affect our affirmance of summary judgment against the plaintiffs who were unable to show an injury. The discovery that was denied sought information on violations of law, the defendants' knowledge, overall contamination, etc. *See* App. at 2334-37 [sic]. These issues go to breach of duty, or violation of law, not to the special monitoring that might be necessary from the exposure involved here. *See also supra* footnote 3. Unlike the other plaintiffs, the Elliotts and their children seek damages beyond medical monitoring and have produced evidence showing present illness, not just future risk of harm.

all the documents fall within one of three categories: "1) [d]raft documents intended only for internal review; 2) comments on draft documents; and 3) internal, pre-decisional notes and memoranda recommending courses of agency action." App. at 1900 [sic]. The affidavit then states in general terms that the documents in each category are within the purview of the privilege.[21] The listing provided some benefit to the district court in its description of the documents, but the detail given in the various descriptions varies. The description given for most of the documents withheld provides little more than general information indicating which of the three general categories the documents fall into. For example, one document is described as "August 1990 draft New Cumberland Army Depot Remedial Investigation/Feasibility Study of the AMSCS." Approximately two months after the filing of the initial affidavit and document list, the defendants presented the district court with a second affidavit, verbatim except for the different date, and a listing of an additional 82 documents

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21. The entire argument the United States presented to the district court follows:

> An essential element in the effective management of the Army's environmental program at Army installations is the assurance that the Army, its contractors, and other reviewing agencies may engage in free and candid discussions while formulating Army positions, arriving at Army decisions, and preparing final versions of Army documents. Draft documents and the comments on draft documents listed in attachment 1 are an integral part of the deliberational, predecisional processes that results in a final Army decision. Editorial changes that would be apparent fr[o]m a comparison of the draft to the final document reflect the personal opinions and mental impressions of the drafting and editing staff. Disclosure of draft documents and comments on drafts would stifle the editing process and impair the frank presentation of ideas that accompanies the drafting and finalization of Army documents. Disclosure would, therefore, result in an identifiable harm to the public interest, namely an impairment of the decision making process would result in prejudice to the Army's goal of making the best possible decisions and producing the best possible documents.

App. at 1900-01 [sic].

for which the defendants wished to invoke the privilege. The descriptions of these documents were similarly conclusory.

Before this Court, both the United States and the Elliotts dispute the reasoning behind the district court's order. The Elliotts rely on the district court's use of the phrase "compelling reason" in its order to argue that the court erred by applying a "compelling reason test." The United States points to the court's use of the word "outweighs" to argue that the district court applied the correct balance in the exercise of its discretion. The district court stated:

> It is understandable that plaintiffs may wish access to this material but they state no specific or compelling reason to obtain any particular item. Based upon our review of the arguments made and authorities cited we believe the need to protect the predecisional, deliberative process in government decision making outweighs the general desire of plaintiffs to view this material as part of discovery.

App. at 2402 [sic].

We are reluctant, on this record, to decide just what the district court meant by the use of any particular word or phrase. Instead, we think the district court should, on remand, apply the balancing test as we have outlined it. It should also make any findings of fact that may be needed to support its implicit conclusion that the documents sought fell under the deliberative process privilege, if it so decides on remand. *See Comptroller of the Currency*, 967 F.2d at 636 (Although the district court used the language of balancing, "[n]either the order nor the ... hearing that preceded it indicates with any clarity, [ ] the factors that persuaded the court to [reach] this conclusion."); *In re Grand Jury*, 821 F.2d at 959.

The district court may elect to perform a preliminary *in camera* review of the documents in question before balancing

the competing interests and exercising its discretion. In *In re Grand Jury*, we referred to the Supreme Court's statement in *Kerr v. United States District Court*, 426 U.S. 394, 406 (1976), that "in camera review is a highly appropriate and useful means of dealing with claims of governmental privilege." *In re Grand Jury*, 821 F.2d at 959.[22]

In considering the United States' assertion of privilege, the district court should keep in mind the fact that Federal Rule of Civil Procedure 26 authorizes broad discovery into "any matter, not privileged, which is relevant to the subject matter involved in the pending action, *[see* Federal Rule of Civil Procedure 26(b)(1)] but the deliberative process privilege, like other executive privileges, should be narrowly construed." *See Coastal States Gas Corp. v. Dep't. of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980); *Cooney v. Sun Shipbuilding & Drydock Co.*, 288 F. Supp. 708, 716 (E.D. Pa. 1968) (collecting cases).

B. *Waiver of the Privilege*

The plaintiffs also attack the district court's order, dated January 29, 1993, denying their motion to compel discovery of five documents. In this respect, they claim, even if the documents were privileged, that the United States has waived its privilege. Waiver is based on the Army's disclosure of these five

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22. *See also In re Franklin Natl. Bank Securities Litig.*, 478 F. Supp. at 582 ("Given this clash of strong competing interests, the official information privileged usually requires examination of documents in camera."); *Northrop v. McDonnell Douglas Corp.*, 751 F.2d 395, 405 (D.C. Cir. 1984) ("The litigant's need for the information cannot be balanced against its sensitive and critical role in the government's decision making process without any indication of what that information is.").

The plaintiffs also contend that the district court erred by not considering whether the government committed illegal acts, the fact that the government is alleged to be a tortfeasor, that the individual who characterized the documents could not objectively evaluate their deliberative content, that the government failed to persuasively show the potential harm from disclosure and that the government failed to adequately describe the documents. We believe these tests tend to beg the privilege question.

documents in the course of a subsequent response. The district court concluded that this disclosure was "inadvertent" and did not qualify as a "voluntary" waiver. App. at 2621 [sic]. *See Transamerica Computer Co. v. International Business Machines Corp.*, 573 F.2d 646, 651 (9th Cir. 1978). The district court did not err when it rejected the plaintiffs' waiver argument.

We also reject the plaintiffs' contention that the importance of the documents should be factored into the determination of whether the government waived its privilege. The importance of the documents is relevant to the balancing of interests, but the plaintiffs refer us to no cases and we find none stating that it is relevant to waiver. Moreover, we believe the importance of the documents is immaterial to whether their disclosure was voluntary.

C. *Relevance*

Finally, the plaintiffs challenge the district court's order, dated January 14, 1991, regarding their attempt to compel discovery against the Army's contention that the Privacy Act, 5 U.S.C.A. §552a(b)(11) (West 1995), covered some of the plaintiffs' requests. In this order, the district court held that the Privacy Act did not protect the discovery sought, but denied some of the requested discovery as overbroad or burdensome. The plaintiffs contend that the court failed to apply the standards this court requires in deciding whether a discovery request is overbroad or burdensome. *See Josephs v. Harris Corp.*, 677 F.2d 985, 992 (3d Cir. 1982). The United States responds with a footnote in its brief, stating:

> The basis for appealing this order is unclear given the fact that the district court required the United States to supply plaintiffs with information which otherwise would have been protected by the Privacy Act, 5 U.S.C. §552a(b)(11). This Court should reject the appeal be-

cause plaintiffs have failed to show how the district court abused its discretion.

Brief of Appellees at 41 n.22.

In *Josephs*, we stated "the mere statement by a party that the interrogatory was overly broad, burdensome, oppressive and irrelevant is not adequate to voice a successful objection to an interrogatory." *Josephs*, 677 F.2d at 992 (internal quotations omitted). Instead, "the party resisting discovery must show specifically how each interrogatory is not relevant or how each question is overly broad, burdensome or oppressive." *Id.* (citations, internal ellipses and internal quotations omitted).

The record before us has only the district court's order which states its conclusion that the discovery requests were "overbroad and burdensome." App. at 1507 [sic]. On remand the district court might wish to set forth its recognition and use of the *Josephs* standards in support of its conclusion that the plaintiffs' request for some documents be overturned.

VIII. *Conclusion*

The order of the district court dismissing the claims of the Neighbors, the Soccer Plaintiffs and the Township Workers will be affirmed. Its order granting the United States summary judgment on the Elliotts' claims will be reversed, and their case will be remanded for further proceedings consistent with this opinion.

The parties shall each bear their own costs.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 1:CV-90-1072

REDLAND SOCCER CLUB, INC., DEAN G. NEWHOUSE, RICHARD V. SPONG, SR., ROBERT E. KANE, and JACK H. HERSHBERGER, et al.,

Plaintiffs

vs.

DEPARTMENT OF THE ARMY OF THE UNITED STATES OF AMERICA, and THE UNITED STATES OF AMERICA,

Defendants

ORDER

AND NOW, this 29th day of November, 1993, upon consideration of the parties' stipulation of dismissal, it is ordered that Count V of plaintiffs' complaint is dismissed and final judgment is entered in favor of defendants and against plaintiffs.

The Clerk of Court shall close this file.

/s/William W. Caldwell
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 1:CV-90-1073

ROBERT C. O'NEAL, Individually and as Representative of the Estate of Florence M. O'Neal, Decedent, et al.,

Plaintiffs

vs.

DEPARTMENT OF THE ARMY OF THE UNITED STATES OF AMERICA, and THE UNITED STATES OF AMERICA,

Defendants

ORDER

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

Plaintiffs have filed a motion for emergency relief in regard to a discovery dispute that has arisen.

Apparently, the Department of the Army has notified Plaintiffs that it is improper for them to contact current or former employees of the New Cumberland Army Deport [sic] with regard to this case without first complying with 32 CFR §516.35(d). Plaintiffs allege that Defendant's counsel has contacted potential witnesses and told them not to cooperate because of §516.35(d)

We have reviewed the correspondence between the parties and the regulation at issue. Section 516.35(d) mandates that:

> [i]f official information is sought through testimony or otherwise, by a subpoena, order, or litigation-related request, the individual seeking such release or testimony must set forth, in writing and with specificity, the nature and relevance of the official information sought. Subject to §516.39(a), present and former [Department of the Army] military members and civilian personnel may only produce, disclose, release, comment upon, or testify concerning those matters that were specified in writing and properly approved by the SJA or legal adviser ...

The quoted section is known as a *Touhy* provision, so named after *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 71 S.Ct. 416, 95 L.Ed.2d 417 (1951). In *Touhy*, the Court recognize the authority of agency heads to restrict testimony of their subordinates, referring to the need for agencies to centralize determinations regarding the dissemination of information in government files.

In the instant case, Plaintiffs challenge the Army's invocation of its *Touhy* regulation, particularly with regard to former employees of the Depot. They argue (1) that the regulation is inapplicable to this case and (2) that the regulation is constitutionally infirm as a violation of the First and Fifth Amendments.

We believe the plain language of the regulation to indicate that it is applicable to the case at bar. The regulation defines "official information" as that "acquired by Department [of Defense] personnel as part of their official duties or because of their official status within the Department while such personnel were employed by or on behalf of the Department ..." 32 CFR §516, appendix L. Certainly, any information relevant to this case that might be disclosed by former or current employees of the Depot was acquired as part of their official duties. We do note that most of the cases upholding

Touhy regulations are ones in which the federal agency is not a party to the litigation, but merely a potential source of relevant information. *See e.g., Reynolds v. Crowther,* 572 F. Supp. 288 (D. Mass. 1982). The application of *Touhy* regulations in that sort of setting is perhaps more understandable than it is here. Nonetheless, the plain lanquage of the regulation does not make a distinction.

Plaintiffs invite us to find the regulation unconstitutional. We decline. A federal court is to avoid constitutional adjudications when matters can be resolved on other grounds. *Kranson v. Valley Crest Nursing Home,* 755 F.2d 46, 50 (3d Cir. 1985). Here, the record does not indicate that Plaintiffs have properly requested permission of the Army to contact the desired witnesses. It is entirely possible that the Army will give its consent, thus making any constitutional determination unnecessary. The Army has indicated in its brief that it does not seek to hamper discovery, but rather to comply with its regulations and to ensure that contacted employees have the opportunity to have Army counsel present at any session with Plaintiffs' counsel. This is not unreasonable.[1]

We will deny the current motion. The Army requests that we award sanctions so that it might recoup the costs of answering this motion. While we deny the motion, we conclude it does not meet any appropriate standard for the imposition of sanctions.

AND NOW, this 16th day of November, 1993, upon consideration of Plaintiffs' Motion for Emergency Relief, it is ordered that the motion is denied.

/s/William W. Caldwell
United States District Judge

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1. We also note that, with regard to current government employees, any *ex parte,* contact may run afoul of Rule 4.2 of the Pennsylvania Rules of Professional Conduct, which restricts an attorney's contacts with employees of organizations that are represented by counsel.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 1:CV-90-1072

REDLAND SOCCER CLUB, INC., DEAN G. NEWHOUSE, RICHARD V. SPONG, SR., ROBERT E. KANE, and JACK H. HERSHBERGER, et al.,

Plaintiffs

vs.

DEPARTMENT OF THE ARMY OF THE UNITED STATES OF AMERICA, and THE UNITED STATES OF AMERICA,

Defendants

MEMORANDUM

We are considering Defendant's motions to dismiss and for summary judgment and Plaintiffs' motions for partial summary judgment and to strike. We properly exercise jurisdiction over this environmental-law claim according to 28 U.S.C. §1331.

I. *Facts and Procedural History*

As our previous memoranda have described the facts in some detail, our recitation here of the history of the case will be brief.

The New Cumberland Army Depot ("NCAD," now known as Defense Distribution Region East) is a large supply facility operated by the United States Army in Fairview Township, Pennsylvania. For about 40 years, beginning in 1917, NCAD disposed of various forms of waste in a 14-acre landfill

known as the Marsh Run Field. In 1972, the Army determined that it no longer needed much of the land surrounding NCAD and, in 1976, the government transferred Marsh Run Field to Fairview Township by quitclaim deed. Plaintiffs indicate that the field was used for soccer play between 1983 and 1987.

Plaintiffs in *Redland Soccer Club v. Department of the Army* are members of a soccer club that used the field, township employees who worked at the field, and neighbors. Plaintiffs in *Elliott v. United States* are neighbors of the park who allege that their children were exposed to toxins while playing in what is now called Marsh Run Park.[1]

II. *Law and Discussion*

A. *Defendant's Motion to Dismiss*

The Army argues that it is immune from Plaintiffs' tort claims.

1. *The Federal Tort Claims Act and the Discretionary Function Exception*

In 1946, Congress enacted the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §1346(b), which was to serve as a limited waiver of sovereign immunity.

> The FTCA ... waives sovereign immunity in suits against the United States for injuries or losses caused by the negligent or wrongful acts or omissions of any employee of the government under circumstances where a private person would be liable to the claimant.

Sea-Land Service, Inc. v. United States, 919 F.2d 888, 890 (3d Cir. 1990). The FTCA contains an [sic] number of exceptions, including the one at issue here: the discretionary function

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1. For purposes of this Memorandum, we do not address a separate class of plaintiffs, those in *O'Neal v. Department of the Army*.

exception. It exempts from the purview of the FTCA any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. §2680(a). Thus, if a governmental action falls within the discretionary function exception, the waiver of sovereign immunity has no effect and the government remains immune from suit.

The United States Supreme Court has examined the discretionary function exception on several occasions in the 47 years since the FTCA was enacted. The Court's most recent pronouncement was in *United States v. Gaubert*, 499 U.S. 315, 111 S.Ct. 1267, 113 L.Ed.2d 335 (1991). There, the Court re-stated the two-part test it established in *Berkovitz v. United States*, 486 U.S. 531, 108 S.Ct. 1956, 100 L.Ed.2d 531 (1988). A district court considering application of the discretionary function exception is to question (1) whether the act is actually discretionary; *i.e.*, does the government actor have decisions to make or is his conduct prescribed by statute or regulation? and (2) whether the action implicates legislative or administrative decisions grounded in social, economic, and political policy. *Berkovitz, supra*, at 537. In delineating those decisions implicating social, economic or political policy, courts have indicated that the exception is intended to "prevent judicial 'second-guessing' of legislative and administrative decisions ... through the medium of an action in tort." *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814; 104 S.Ct. 2755; 81 L.Ed.2d 660 (1984). Importantly, the exception does not immunize every discretionary act by a government employee or agency; a court must decide "whether that judgment is of the kind that the discretionary function exception was designed to shield." *Berkovitz, supra*, at 536.

We read *Gaubert*, *Berkovitz*, *Varig Airlines*, and the lower-court cases applying them, to draw an important distinction between those acts of government actors that embody public policy and those that are merely every-day decisions devoid of any public policy implications. To implicate public policy, a decision must be "susceptible to policy analysis." *Autery v. United States*, 992 F.2d 1523, 1531 (11th Cir. 1993).

Many actions of government agencies and employees clearly implicate policy decisions. For example, in *Dalehite v. United States*, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed 1427 (1953), the Court considered a case involving a massive explosion in fertilizer being prepared for shipment to Europe as part of a comprehensive program to increase the food supply in occupied countries at the conclusion of World War II. *Id.* The Court determined that the discretionary function exception applied because the fertilizer was gathered and prepared as part of an overall federal policy. *Id.* at 37-38.

Varig Airlines involved a tort challenge to regulations regarding the Federal Aviation Administration's program for "spot-checking" airplanes for safety problems. 467 U.S. at 815. The Court determined that the regulations and the decisions of the FAA in implementing them reflected public policy considerations concerning airline safety and, thus, were within the exception. *Id.*

In *Berkovitz*, the Court determined that a government program regulating laboratories producing polio vaccine reflected public policy concerns, although the Court remanded the case for consideration of whether the decision at issue was, in fact, discretionary. 486 U.S. at 533.

Finally, in *Gaubert*, the Supreme Court reviewed the dismissal of a case alleging negligent supervision of an insolvent savings and loan association by federal regulators. 499 U.S. 315. The Court determined that the actions of the gov-

ernment in regulating the savings and loan and in managing its affairs were actions in furtherance of public policy. *Id.*

These cases share a common theme: in each, the government agency acted in some way to fulfill the mandate of Congress; each case involved either government regulation of private conduct or government conduct of foreign affairs as delegated to the agency. Public policy, however, is not implicated by everything the government does. As Justice Byron White wrote in *Gaubert:*

> There are obviously discretionary acts performed by a Government agent that are within the scope of his employment but not within the discretionary function exception because these acts cannot be said to be based on the purposes that the regulatory regime seeks to accomplish. If one of the officials involved in this case drove an automobile on a mission connected with his official duties and negligently collided with another car, the exception would not apply. Although driving requires the constant exercise of discretion, the official's decisions in exercising that discretion can hardly be said to be grounded in regulatory policy.

113 L.Ed.2d at 348 n.7. Finally, the United States Court of Appeals for the First Circuit has recently explained that:

> "[i]f the injury-producing conduct was an integral part of government policymaking or planning, if the imposition of liability might jeopardize the quality of the governmental process, or if the case could not be decided without usurping the power and responsibility of either the legislative or executive branch of government, governmental immunity would probably attach."

Horta v. Sullivan, No. 92-1962, 1993 WL 323615 at *15 (1st Cir. Aug. 31, 1993) *quoting Harry Stoller and Company, Inc. v. Lowell*, 587 N.E.2d 780, 783 (Mass. 1992).

In summary, we draw the distinction implicit in the case-law between decisions by the government that implicate public policy and those that are merely the sorts of decisions made every day by individuals and corporations to manage their affairs.[2] An example is illustrative: the Federal Emergency Management Agency ("FEMA") is an agency charged with coordinating federal response to various crises. If FEMA managers decide not to send federal funds to Iowa after a major flood, the decision would presumably be one protected by the discretionary functions exception. The decision would be reached as part of FEMA's congressionally delegated powers and would necessarily implicate public policy considerations. On the other hand, if FEMA managers elect to require agency employees to recycle paper in FEMA offices, the decision is certainly discretionary but it does not involve public policy and is not the type Congress intended to shield.

2. *The Application of the Discretionary Function Exception to The Case at Bar*

The question of the applicability of the FTCA and its exceptions to an action is, in effect, an issue of subject-matter jurisdiction. *Mortensen v. First Federal Savings & Loan Ass'n*, 549 F.2d 884 (3d Cir. 1977). As such, in considering whether an action falls within an exception to the FTCA, we do not consider the merits of the case or the factual record beyond its description of the nature of the governmental action. *Id.* Further, the FTCA, as a waiver of sovereign immunity, must be strictly construed in favor of the government. *Sea-Land Service, Inc., supra,* at 889.

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2. For a review of some of the reasons underlying the discretionary function exception, see Barry R. Goldman, Note, *Can The King Do No Wrong? A New Look At The Discretionary Function Exception To The Federal Tort Claims Act*, 26 Ga. L. Rev. 837 (1992). Among the rationales for the exception are (1) the separation of powers doctrine, (2) encouragement of vigorous government enforcement efforts, and (3) the avoidance of huge fiscal liability. *Id.* at 852-56.

In the instant case, the Army argues that the decisions regarding waste disposal and land transfer at Marsh Run Park meet the first prong of the *Berkovitz* test; namely, that the decisions were truly discretionary. Further, the Army asserts that the decisions must implicate policy concerns, thus satisfying the second prong of the *Berkovitz* test.

> The decisions referred to—including selecting a method of waste disposal, classification of some waste material as salvageable, locating the landfill, and selecting methods of operating and maintaining the landfill—are the type of decisions dominated by considerations of affordability, efficiency and safety. Therefore, they are decisions grounded in policy, and are thus protected by the discretionary functions exception.

Defendant's Brief in Support of Motion to Dismiss at 30.

Plaintiffs dispute Defendant's analysis, focusing primarily on the first part of the *Berkovitz* test. Plaintiffs contend that various statutes and regulations made the various actions by the Army non-discretionary.

Plaintiffs address only in passing the second prong of the *Berkovitz* analysis, which we find dispositive of the issue. As we have noted, not every discretionary action undertaken by a government actor falls within the discretionary function exception. We examine the "nature of the conduct, rather than the status of the actor." *Varig Airlines, supra,* at 813. The Army's actions with regard to Marsh Run Park were not the sorts of decisions contemplated by the discretionary functions exception.

Defendant contends that, because it had to determine how and where to dispose of waste and because these questions are governed by considerations of cost and safety, policy in the *Berkovitz* sense is necessarily implicated. We disagree. We construe *Berkovitz* and the cases preceding and following

it to refer to a specific sort of policy—not merely policy regarding internal affairs of the agency but policy in more direct furtherance of the agency or department's congressionally delegated mission.[3]

Here, Army officials determined where to place a landfill, what to commit to the landfill, and whether to transfer the land to Fairview Township. These are largely internal decisions. While we have little doubt there was a process of deliberation involved, we are dubious that this sort of policy is of the kind "that the discretionary function exception was designed to shield." *Berkovitz, supra,* at 536; *see also, Powers v. United States,* 996 F.2d 1121, 1126 (11th Cir. 1993). Here, the Army, acting as would any large corporation, made certain decisions regarding disposal of waste. Only in the most tangential way could it be said that these decisions were in furtherance of the Army's mandate.[4]

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3. While the case law in this area is regrettably sparse, we believe this interpretation of *Berkovitz* to be in accord with the holdings of that case and the others cited, *supra.* We are bolstered in this conclusion by reference to one of the major rationales for the discretionary function exception: separation of powers. The exception serves to protect the executive and legislative branches from judicial "second-guessing" while they are fulfilling their constitutional duties. *Varig Airlines,* 467 U.S. at 814. Indeed, in *Gaubert,* the Court wrote:

> Where Congress has delegated the authority to an independent agency or to the executive branch to implement the general provisions of a regulatory statute and to issue regulations to that end, there is no doubt that planning-level decisions establishing programs are protected by the discretionary function exception, as is the promulgation of regulations by which the agencies are to carry out the programs. In addition, the actions of Government agents involving the necessary element of choice and grounded in the social, economic, or political goals of the statute and regulations are protected.

113 L.Ed. at 346.

4. Indeed, if pressed far enough, a soldier's decision about how to drive an automobile could be said to be in furtherance of public policy. *See Gaubert,* 113 L.Ed.2d at 348 n.7 (quoted, *supra).*

While the case law interpreting what sorts of decisions reflect economic, social or political policy is enigmatic, we find a distinction between the facts of the instant case and those of *Dalehite*, *Varig Airlines*, *Berkovitz*, and *Gaubert*. Thus, we will deny Defendant's motion as it relates to the discretionary function exception of the FTCA.

2. *FTCA Claims of Public Nuisance and Trespass*

The Army initially moved for dismissal of Counts III and V of the *Redland* complaint on the ground that they were based on a theory of strict liability, which is not available under the FTCA. *Laird v. Nelms*, 406 U.S. 797, 92 S.Ct. 1899, 32 L.Ed.2d 499 (1972).

Plaintiffs respond that

> [i]n the instant action, Plaintiffs are not seeking to recover in trespass and nuisance under a strict liability theory; Defendants' numerous negligent acts are what give rise to the trespass and nuisance claims.

Plaintiffs' Brief in Opposition at 13. The Army answers that, to the extent the claims are based in negligence rather than strict liability and so long as the claims are not otherwise barred, jurisdiction is not at issue. Defendant's Reply Brief at 13. Plaintiffs have cast their claims as sounding in negligence and, as such, we will not dismiss them.

B. *Defendant's Motion for Summary Judgment on FTCA Claims*

Defendant seeks summary judgment in its favor on Plaintiffs' claims for medical monitoring and emotional distress.

Summary judgment is appropriate when there remain no genuine issues as to any material facts and judgment may be entered as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986). When a movant submits that there is no genuine issue as to a

material fact, its opponent must do more than "simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co., Ltd., et al v. Zenith Radio Corp., et al,* 475 U.S. 574, 586; 106 S.Ct. 1348, 1356; 89 L.Ed.2d 538 (1986).

1. *Medical Monitoring*

The Third Circuit has concluded that, presented with the issue, the Pennsylvania Supreme Court would recognize a cause of action for medical monitoring. *In Re Paoli R.R. Yard PCB Litigation,* 916 F.2d 829, 851 (3d Cir. 1990); *see also, Merry v. Westinghouse Electric Corp.*, 684 F. Supp. 847 (M.D. Pa. 1988) (Caldwell, J.). The *Paoli* court set forth a four-part test to ascertain when medical monitoring would be appropriate. A plaintiff (or plaintiffs) must prove that:

> 1. The plaintiff was significantly exposed to a proven hazardous substance though [sic] the negligent actions of the defendant.
>
> 2. As a proximate result of exposure, the plaintiff suffers a significantly increased risk of contracting a serious latent disease.
>
> 3. That the increased risk makes periodic diagnostic medical examinations reasonably necessary.
>
> 4. Monitoring and testing procedures exist which make the early detection and treatment of the disease possible and beneficial.

916 F.2d at 852. The policy reasons for recognizing this tort are legion. Society has reached a point in which potentially toxic chemicals and products are commonly used by government and industry. It is now not only possible but likely that many victims of negligent exposure to toxins will not see the

health effects of that exposure for months or even years after their contaminations.[5]

Defendant's motion focuses initially on the first part of the *Paoli* test: proof of significant exposure. This is a crucial element. Upon review of *Paoli* and the relatively few cases from other circuits and districts, we determine that, to meet this requirement, Plaintiffs must offer clear evidence that they were exposed not only to the soil and water on the surface of the Marsh Run Park, but to the actual toxins they claim are there.

We find support for this determination in a number of cases. In *Paoli*, the plaintiffs offered expert testimony claiming, *inter alia*, that there were increased levels of certain toxins (polychlorinated biphenyls or PCBs) in the plaintiffs' blood. 916 F.2d at 842. Thus, there was enough evidence of actual exposure to preclude entry of summary judgment; a triable factual dispute regarding the amount of the exposure and the derivation remained.

In *Friends For All Children v. Lockheed Aircraft*, 746 F.2d 816 (D.C. Cir. 1984), the D.C. Circuit examined an analogous case. A group of Vietnamese orphans was being flown from Saigon to the United States aboard a Lockheed jet when the aircraft suffered sudden decompression and loss of cabin pressure. *Id.* at 819. After a crash landing, many of the children died, but the guardians of those who lived brought a lawsuit seeking, among other things, periodic diagnostic tests of the children to determine if the decompression and loss of oxygen had affected them. *Id.* The court approved medical monitoring and offered a hypothetical:

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5. For more detailed descriptions of the advent of medical monitoring, see Amy B. Blumenberg, *Medical Monitoring Funds: The Periodic Payment of Future Medical Surveillance Expenses in Toxic Exposure Litigation*, 43 Hastings L.J. 661 (1992); Allan Kanner, *Medical Monitoring: State and Federal Perspectives*, 2 Tul. Envtl. L.J. 1 (1989).

> Jones is knocked down by a motorbike which Smith is riding through a red light. Jones lands on his head with some force. Understandably shaken, Jones enters a hospital where doctors recommend that he undergo a battery of tests to determine whether he has suffered any internal head injuries. The tests prove negative, but Jones sues Smith solely for what turns out to be the substantial cost of the diagnostic examinations.

Id. at 825. The court's analogy is equally applicable to a toxic tort case such as the one at bar. Jones was clearly exposed to a risk of harm when the motorbike knocked him down and his head struck the ground. Similarly, we believe that a toxic tort plaintiff must prove that he was *definitely* exposed to some agent that *may* later cause him harm. There is, of necessity, a degree of speculation in a medical monitoring case. However, we conclude that the allowable conjecture should be in regard to the amount or future effect of the exposure, not whether there was exposure at all.

In *Abuan v. General Electric Co.*, Nos. 92-15476, 92-15662, 1993 WL 321868 (9th Cir. Aug. 26, 1993), the plaintiffs alleged that they had been exposed to PCBs and sued the manufacturer of the PCBs and the electrical transformer they alleged exposed them to the toxins. The Ninth Circuit affirmed the district court's entry of summary judgment in part because the plaintiffs had failed to demonstrate that each individual had actually been exposed to PCBs. *Id.* at *4.

Thus, while there is a dearth of case law interpreting what sort of exposure a plaintiff must prove in a medical monitoring case, we hold that a plaintiff in such a case must prove that he was actually exposed to a toxic agent—not merely that he

might have been exposed.[6] Thus, to survive the current motion, Plaintiffs must offer sufficient evidence to raise a dispute about whether they were exposed to the toxins alleged to be buried in the Marsh Run Park.[7]

Defendant argues that Plaintiffs' expert merely speculates about whether any of the Plaintiffs actually were exposed to the toxins alleged to be buried at the Marsh Run Park. An examination of the expert's report supports this assertion.

> The soccer field which was established on the abandoned landfill, and the surrounding marsh and stream, offer many *potential* routes of exposure to the chemicals disposed in the landfill. The following *appear* to be *the most likely* pathways through which the children and adults using the soccer field *could* have been exposed to the chemicals of concern.

Public Health Risk Assessment Of A Soccer Field Near The New Cumberland Army Depot [hereafter, *"Plaintiff's Report"*] at 16 (emphasis added). The report explains that the levels of toxins found in the soil were measured largely in test pits; in other words, the results reflect levels not at the surface of the field but underneath. *Id.* at 7-15. The report contains conjecture about the amounts that would have been on the surface of the field at the time the various Plaintiffs had contact with it. *Id.* Further, the report speculates regarding various ways Plaintiffs might have had contact with the soil on the surface: (1) direct ingestion while playing on the field, (2) direct inges-

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6. We distinguish this holding from our conclusion in *Merry* that plaintiffs seeking medical monitoring need not demonstrate present physical injury. 684 F. Supp. at 849.

7. If Plaintiffs' expert conclusively testifies that there was some exposure and Defendant's expert testifies otherwise, there would be a genuine issue as to a material fact so as to defeat summary judgment because a factfinder would have to weigh the experts' credibility.

tion of water while playing on the field, (3) dermal contact with contaminated soil or water, or (4) inhalation of contaminated dust from the playing field.

> Children and teen-agers playing soccer and adults organizing, coaching, and refereeing the games are all subject to ingesting soil and dust from the soccer field.

Plaintiff's Report at 16.

> Rain water on the soccer field will leach chemicals from the soil. Children and adults using the field during and after a rain *may* be exposed to chemicals in puddles on the field or to runoff water in the drainage ditches and marshy areas with standing water surrounding the field.

Id. at 17 (emphasis added).

> Toxic and hazardous chemicals in soils and mud on the hands and legs of children and adults *can* cross through the skin and reach the blood stream.

Id. at 18 (emphasis added).

> Calculations were also made of the amounts of volatile organic compounds which *might* volatize from the soil and be inhaled by the children and adults on the soccer field.

Id. at 19 (emphasis added).

Thus, Plaintiffs' expert never reports that anyone had actual contact with contaminants. The report speculates that, when the field was in use, the surface soil had contaminants and that the Plaintiffs were exposed to those contaminants through the means described above; there is here a sort of double speculation. What is noticeably absent is any evidence that any of the toxins listed in the report *actually* were at the surface of the field when Plaintiffs played there or that any of the toxins *actually* invaded the bodies of the Plaintiffs. There

is no evidence of blood or tissue tests as were conducted in *Paoli*. 706 F. Supp. 358, 365 (E.D. Pa. 1988) (district court opinion describing expert opinions based on blood tests). Thus, Plaintiffs would ask a factfinder to accept not only speculation that the toxins might later cause medical complications but speculation that Plaintiffs were actually exposed to the toxins at all.

In response to this argument, Plaintiffs assert that Defendant's criticism of Plaintiffs' expert merely shows that there is a factual dispute. We disagree. Even if we were to assume that Plaintiffs' expert is credible, we would have to find that he has not offered definitive testimony that Plaintiffs were actually exposed to any toxins.[8] Plaintiffs' expert, Dr. Richard Cronce, makes clear in his reports that he can not testify that there were contaminants in the soil *at the surface* of the field when Plaintiffs were present there.

> A number of assumptions concerning exposure and resulting health effects must be made in a risk assessment, with concomitant uncertainties.

Comments on the Declaration of Roger Minear at 3.

> REWAI does not in anyway suggest that the risk assessment can provide the "true risk", since the actual exposures of children and adults to the contaminants at the soccer field can not be determined. The actual amounts of soil, dust, and water contacted, ingested or inhaled were not measured at the time of play on the field and now can never be known. However, reasonable as-

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8. It is helpful to again refer to the D.C. Circuit's analogy from *Friends For All Children* in which the man struck by a motorbike seeks medical care to assure that no non-apparent injury has befallen him. Jones, the man who was struck, knew with certainty that he had struck his head. The speculation that made his visit to the hospital reasonable was as to whether the blow to the head had caused an injury, not whether there had ever been a blow to the head.

> sumptions can be made to determine whether significant risks to human health exist ...

Comments on the Declaration of Martyn T. Smith at 2. Indeed, Defendant's expert, Dr. Martyn Smith, offers similar testimony.

> Hence, we cannot know for certain if anyone playing soccer came into contact with any site-originated chemicals. We do not know for certain that any chemicals leached upwards into surface water or volatized into the air. Thus, all exposures are "hypothetical" and, in my opinion, plaintiffs experts have failed to document any actual chemical exposure.

Second Declaration of Dr. Martyn T. Smith at ¶9.

In addition to their expert's report, Plaintiffs offer anecdotal evidence of exposure:

> However, [Plaintiff] Richard V. Spong, Jr. has testified that soccer was played during rain. He recalls playing soccer when there were puddles on the field, some of which were an inch or two deep. He specifically recalls falling face first into puddles. Upon falling, the whole front of his body would get wet. He also recalls falling into the dirt "a lot" and actually getting soil in his mouth! Thus, those factual issues are very clearly in dispute and will have to be addressed at trial.

Plaintiffs' Brief in Opposition at 17 (citations omitted).

> The adjacent landowners have regularly waded in Marsh Run Creek, which was contaminated by hazardous substances. The adjacent landowner Plaintiffs used MRP for recreation purposes even before it was excavated into a soccer field. Plaintiffs even have drank water from Marsh Run Creek. One Plaintiff actually drank water

> from the Creek around the time major fish kills occurred as a result of illegal activities at NCAD.
>
> The Township workers also had to work in the Creek on occasion.
>
> • • •
>
> During the excavation and landscaping the Township workers walked in the dirt and inhaled dust, and sat and ate their lunches on the field.

Id. at 17-18. Again, this evidence fails to demonstrate that any toxins were at the surface of the field or that any toxins were actually introduced into Plaintiffs' bodies.[9]

Thus, to ultimately find in favor of Plaintiffs' medical monitoring claims, we would have to allow speculation that: (1) there were toxins at the surface of the field or close enough that persons on the field would come into contact with them, (2) the Plaintiffs ingested, inhaled or otherwise contacted soil, dust or water contaminated with those toxins, and (3) the toxins settled in any way into Plaintiffs' bodies.[10] We conclude that, as a matter of law, Plaintiffs have failed to demonstrate that there is a dispute as to a material fact—namely, whether they were actually exposed to toxic substances as would be required to make out a medical monitoring claim according to *Paoli*. We will grant Defendant's motion and enter judgment against Plaintiffs on the medical monitoring claim.

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9. Plaintiffs' expert relied on soil sample results that were derived from "test pits," holes dug several feet into the ground, rather than the surface of the field itself. Defendant offers expert testimony that actual surface samples did not reveal traces of *volatile organic compounds*. *See Second Declaration of Roger Minear* at ¶4. Defendant's expert contends that, in reality, the chemicals found in the Marsh Run landfill would tend to migrate downward over time, thus making exposure at the surface less rather than more likely. *Id.*

10. We ignore, for the moment, the other three steps in the *Paoli* test for medical monitoring claims.

2. *Emotional Distress*

Defendant also seeks summary judgment on Plaintiffs' claim for emotional distress arising from their alleged exposure to the toxins at Marsh Run Park.

It is clear that Pennsylvania law does not provide recovery for negligent infliction of emotional distress absent some physical injury or impact. *Wisniewski v. Johns-Manville Corp.*, 759 F.2d 271, 274 (3d Cir. 1985); *Bubash v. Philadelphia Elec. Co.*, 717 F. Supp. 297, 301-02 (M.D. Pa. 1989) (Caldwell, J.).

Defendant contends, and the record corroborates, that no Plaintiff in *Redland Soccer Club, Inc., et al. v. Dep't of the Army* has suffered a physical injury. Plaintiff responds that our opinion in *Merry*, 684 F. Supp. 847 (M.D. Pa. 1988) (Caldwell, J.) serves as "law of the case" and, thus, that Defendant's motion is "shocking."[11] We disagree. In *Merry*, we held that a plaintiff seeking damages for negligent infliction of emotional distress must show some physical impact. 684 F. Supp. at 852. In that case, the plaintiffs could show that their well water was contaminated and that they drank the water. Moreover, several plaintiffs had shown present physical effects. *See Bubash*, 717 F. Supp. at 301.

In the instant case, Plaintiffs do not dispute that none show present physical injury. Further, we have held that Plaintiffs have not demonstrated even that they were actually exposed to toxins; hence, Plaintiffs can not show a present physical effect of the type we discussed in *Bubash, supra.* Thus, summary judgment is appropriate and will be entered.

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11. Plaintiffs' reference to any holding of *Merry* as "law of the case" is incorrect. The "law of the case" doctrine refers to previous holdings in the case under consideration, not merely to previous holdings by the same Court. *See Fagan v. City of Vineland*, No. 92-5551, 1993 U.S. App. LEXIS 20327 (3d Cir. Aug. 5, 1993) *(vacated and petition for rehearing en banc granted on other grounds).*

C. *Plaintiffs' Motion for Partial Summary Judgment*

Plaintiffs have moved for partial summary judgment, arguing that we should hold that the Army committed negligence *per se* in its activities at NCAD.

Plaintiffs primarily cite *Clark v. United States*, 660 F. Supp. 1164 (W.D. Wash. 1987), in which the court held a bench trial and concluded that the Air Force was *per se* negligent because of violations of various Washington state environmental statutes. *Id.* at 1176.

Defendant answers that the *Clark* opinion is distinguishable because (1) negligence *per se* is defined differently in Pennsylvania than in Washington and Plaintiffs have failed to meet Pennsylvania's standard and (2) even if the Washington definition were used, Plaintiffs have failed to meet that standard.

The FTCA, under which this action was brought, requires a district court to apply the common law of the state where the act or omission in question occurred. 28 U.S.C. §1346(b).

Plaintiffs refer to *Clark* as directly analogous. We disagree because, at the time *Clark* was decided, Washington law allowed a finding of negligence *per se* based solely upon a determination that the defendant had violated a statute. *See Henderson v. Bahlman, et al.*, 310 P.2d 1077 (Wash. 1957).[12]

Pennsylvania law establishes a more rigorous test: (1) the statute or regulation must clearly apply to the conduct of the defendant, (2) the defendant must violate the statute or regulation, (3) the violation must proximately cause the plaintiff's injuries, and (4) the intent of the statute must have been to protect the interests of the plaintiff individually rather than

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12. Washington's legislature has since abolished common-law negligence *per se*, effective after the events in *Clark* took place. *See Hanson v. Friend, et al.*, 824 P.2d 483, 486 (Wash. 1992).

generally. *See Cecile Ind., Inc. v. United States*, 793 F.2d 97, 99-100 (3d Cir. 1986).

In the briefs, Plaintiffs do not address these four considerations. While they refer to a number of federal and state statutes and regulations, they do not describe how those enactments were intended to protect the interests of Plaintiffs individually rather than the public at large. Further, Plaintiffs have not shown that there are no issues of material facts regarding precisely what the Army did and whether it violated the statutes and regulations cited. As Plaintiffs argued in response to Defendant's motion for summary judgment, the nature of the deposits at NCAD is subject to differing expert testimony.[13] We can not now conclude that Plaintiffs have met their burden of demonstrating that particular acts of Defendant violated specific statutes or regulations. Thus, summary judgment would be inappropriate. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986).

D. *Plaintiffs' Motion to Strike*

Finally, Plaintiffs ask that we strike certain paragraphs of Defendant's response to Plaintiffs' statements of material fact filed pursuant to Local Rule 401.4.

The primary basis for Plaintiffs' motion is that the Army's responses are not proper according to the rule and the cases interpreting it. While we might otherwise explore the issue further, we recognize that Rule 401.4 seeks to make the consideration of motions more efficient. The instant case is one of considerable duration and complexity. Were we to strike portions of Defendant's filing, we would make a lengthy and complicated process even more so. We have carefully read the documents presented by the parties and have been able to

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13. Although, in the context of Defendant's motion, we determined ultimately that there was no dispute on the issue of Plaintiffs' exposure.

discern where factual issues remain. Thus, we will deny the motion in order that this case might progress without further, unnecessary delay.[14]

III. *Conclusion*

As noted, these cases have been pending for several years and have accumulated voluminous filings. The trial date looms near and we would suggest at this time that the parties file a jointly prepared status report on or before November 15, 1993. That report would be brief, merely describing *precisely* what claims were made in each of the three pending cases, which of those claims have been dismissed, and which remain for trial, if any.

We will issue an appropriate order.

/s/William W. Caldwell
United States District Judge

Date: October 19, 1993

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14. Plaintiffs cite other technical problems with Defendant's filings. Those problems have either been corrected or are of little consequence given our disposition on the merits.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 1:CV-90-1072

REDLAND SOCCER CLUB, INC., DEAN G. NEWHOUSE, RICHARD V. SPONG, SR., ROBERT E. KANE, and JACK H. HERSHBERGER, et al.,

Plaintiffs

vs.

1072

DEPARTMENT OF THE ARMY OF THE UNITED STATES OF AMERICA, and THE UNITED STATES OF AMERICA,

Defendants

ORDER AND JUDGMENT

AND NOW, this 19th day of October, 1993, upon consideration of Defendant's motion to dismiss, Defendant's motion for summary judgment, Plaintiffs' motion for partial summary judgment, and Plaintiffs' motion to strike, it is ordered that:

1. Defendant's motion to dismiss is denied.

2. Defendant's motion for summary judgment on the medical monitoring and emotional distress claims in *Redland Soccer Club, Inc., et al. v. Department of the Army* is granted and judgment is entered in favor of Defendant and against Plaintiffs on those claims.

3. Plaintiffs' motion for partial summary judgment is denied.

4. Plaintiffs' motion to strike is denied.

5. The parties shall file a joint status report by November 15, 1993, identifying the issues, if any, that remain for trial. In the event that there are none, a final order will issue from which appeals may be taken.

/s/William W. Caldwell
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 1:CV-90-1072

REDLAND SOCCER CLUB, INC., DEAN G. NEWHOUSE, RICHARD V. SPONG, SR., ROBERT.E. KANE, and JACK H. HERSHBERGER, et al.,

Plaintiffs

vs.

DEPARTMENT OF THE ARMY OF THE UNITED STATES OF AMERICA, and THE UNITED STATES OF AMERICA,

Defendants

CIVIL ACTION NO. 1:CV-90-1073

ROBERT C. O'NEAL, Individually and as Representative of the Estate of Florence M. O'Neal, Decedent, et al.,

Plaintiffs

vs.

DEPARTMENT OF THE ARMY OF THE UNITED STATES OF AMERICA, and THE UNITED STATES OF AMERICA,

Defendants

ORDER

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

Pending is defendants' motion for a protective order arising from plaintiffs' notice of deposition filed according to Fed. R. Civ. P. 30(b)(6).

This environmental litigation involves various areas around a United States Army depot in New Cumberland,

Pennsylvania. Plaintiffs allege, *inter alia*, that the Army cleanup of several sites around the depot was inadequate. The current discovery motion involves six potential government deponents.

In a deposition notice dated February 2, 1993, plaintiffs requested that the Army provide deposition witnesses to testify to various U.S. Army studies and investigations involving Marsh Run Park, near the depot. The Army replied that the appropriate persons included four people who live and work in Omaha, Nebraska, one who lives and works in Atlanta, and one who lives and works in Washington, D.C. Because of their distance from the proposed site of the depositions, Harrisburg, Pennsylvania, defendants have sought a protective order indicating that the depositions must take place where the six individuals live and work. Plaintiffs counter that this is unduly burdensome on them.

The Omaha witnesses include Dan Manning, Don Ohnstad, Sandra Cotter, and Steve White. Defendants indicate that all work for the Army Corps of Engineers and oversaw performance of the studies involving Marsh Run Park. The Atlanta witness is Lynn Wilder. Ms. Wilder worked for Weston Sper, which is apparently a consulting firm, and oversaw a study at the park performed for the United States Environmental Protection Agency. The Washington witness, Donald Gross, had personal involvement in various studies conducted at Marsh Run Park by the United States' Army Toxic and Hazardous Materials Agency.[1] Defendants indicate that these six individuals have personal knowledge of the studies in question.

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1. Despite our request for detailed information about the witnesses, defendants' brief is unfortunately sparse. We believe the information we have described is accurate.

We note initially that the burden is on the Army, as the party seeking the protective order. The proponent of a motion for a protective order must demonstrate good cause. Fed. R. Civ. P. 26(c); *See Leist v. Union Oil Co. of California*, 82 F.R.D. 203, 204 (E.D. Wisc. 1979).

We read the defendants' motion as claiming "undue burden or expense" if the Army is required to bring the six witnesses to Harrisburg. Fed. R. Civ. P. 26(c). Indeed, defendants offer by way of analogy various cases indicating that corporate deposition witnesses must ordinarily be deposed in their principle places of business, which defendants claim means Omaha, Atlanta, and Washington. *See, e.g., Trans Pacific Insurance Co. v. Trans-Pacific Insurance Co.*, 136 F.R.D. 385, 392 (E.D. Pa. 1991). Plaintiffs counter that the principal place of business of any person working for the federal government is Washington, D.C., and that the depositions might properly be held there.

Defendants also contend that all six work in positions in which out-of-state trips would be burdensome. Indeed, defendants argue that, because Army personnel are involved, international peacekeeping and national defense must be considered. We reject this latter argument; there is no indication that any of these six people is involved in anything but environmental study and the mere fact that they work with the Army does not implicate broader military concerns.

Plaintiffs primarily argue that they will be unduly burdened financially by travelling to Omaha and Atlanta.

In resolving a motion for a protective order, a court must examine the particular facts and equities at hand. *Leist, supra.* Factors for consideration include whether witnesses or their employers will suffer harm because of the witnesses absence

from work for deposition, *Tomingas v. Douglas Aircraft Co.*, 45 F.R.D. 94, 97 (S.D.N.Y. 1968) and whether the travel will work an undue hardship on the witnesses. *Benchmark Design, Inc. v. BDC, Inc.*, 125 F.R.D. 511, 512 (D. Ore. 1989). Additionally, plaintiffs argue that the financial resources of the government are far greater than theirs and that the Army *chose* to designate these individuals for deposition and that, therefore, the burden should fall on the Army.

Our examination of the equities leads us to conclude that there are well-grounded arguments on both sides. There are several possible solutions. We could order that the depositions be taken by telephone, according to Fed. R. Civ. P. 30(b)(7), an option encouraged by defendants. Plaintiffs, however, have indicated that there are voluminous documents to be introduced at the depositions that might make telephone proceedings impractical. Plaintiffs advocate the designation of Washington, D.C., as the appropriate site, pointing to their argument that Washington is the federal government's principle place of business. This seems a somewhat attenuated solution; with the exception of Mr. Gross, who lives in Washington, a trip to Washington involves the same hardships as a trip to Harrisburg.

We conclude that defendants have shown good cause. The only viable resolution is for plaintiffs to accept telephone depositions or for the parties to share equally the cost for one of plaintiffs' counsel to travel to Omaha, Atlanta, and Washington. While undoubtedly not satisfactory to either party, we believe this direction to be the only appropriate way to reconcile the equities.

AND NOW, this 4th day of March, 1993, upon consideration of defendants' motion for a protective order, it is ordered that:

1. The motion is granted.

2. The parties will agree among themselves whether the depositions called for in the notice of February 3, 1993, will take place by telephone or in person, with the parties sharing equally the travel costs of one of plaintiffs' attorneys to Omaha, Atlanta, and Washington and return.

/s/William W. Caldwell
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 1:CV-90-1072

REDLAND SOCCER CLUB, INC., DEAN G. NEWHOUSE, RICHARD V. SPONG, SR., ROBERT E. KANE, and JACK H. HERSHBERGER, et al.,

Plaintiffs

vs.

DEPARTMENT OF THE ARMY OF THE UNITED STATES OF AMERICA, and THE UNITED STATES OF AMERICA,

Defendants

CIVIL ACTION NO. 1:CV-90-1073

ROBERT C. O'NEAL, Individually and as Representative of the Estate of Florence M. O'Neal, Decedent, et al.,

Plaintiffs

vs.

DEPARTMENT OF THE ARMY OF THE UNITED STATES OF AMERICA, and THE UNITED STATES OF AMERICA,

Defendants

MEMORANDUM

Pending is plaintiffs' motion to compel and defendants' opposition based upon executive privilege.[1]

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1. We note as a threshold matter that this motion comes before us in an unusual posture. Plaintiffs' style their motion as one to compel production. However, they are already in possession of the five documents in question as the result of a stipulation filed January 6, 1992. That stipulation provided that defendants would produce the documents subject to a confidentiality agreement, the subject

The material in question includes five documents prepared by several United States Army officials. The documents refer to the property that is the subject of the Redland lawsuit. Defendants claim that the documents fall within the ambit of the "deliberative process" privilege, one of a number of privileges emanating from the executive privilege. Such privileges are to be narrowly construed. *In re Grand Jury Proceedings*, 599 F.2d 1224, 1228 (3d Cir. 1979). Plaintiffs claim that the privilege does not apply or, alternately, that it has been waived.

I

Plaintiffs argue that the deliberative process privilege is not absolute and that a court considering a claim of the privilege must balance the government's need for secrecy against a private party's need for the information. *In re Grand Jury Proceedings, supra.* Plaintiffs argue that the documents provide evidence important to their claim that the Army failed to warn them of dangers of possible contamination.

We note, first, that we have examined this issue previously. In our order of August 13, 1992, we determined that these documents, along with 134 others, were privileged. We found that plaintiff had offered no compelling reason to defeat the claim of privilege. While we presume the current motion is an attempt to provide such a compelling reason, we do not believe a modification of our prior order would be appropriate. While the five documents would certainly be of interest to plaintiffs, they fall within the protection of the privilege. We do not find plaintiffs' stated reasons so compelling as to warrant breaching the privilege.[2] We will follow our order of August 13, 1992, and find the five documents privileged.

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of their privileged status to be resolved at a later date. So, plaintiffs do not actually seek production, but permission to use the documents in depositions and, presumably, at trial.

2. There is reason to doubt whether a failure to warn claim may be brought under the Federal Tort Claims Act, 28 U.S.C. §2671, *et seq. See Begay v. United States*, 768 F.2d 1059, 1064 (9th Cir. 1985).

II

Plaintiffs also again contend that defendants waived the privilege by accidentally producing the five documents. Apparently, the documents were among myriad documents defendants allows plaintiffs' counsel to examine. Plaintiffs' counsel designated those documents and many others to be photocopied. Only when defendants' counsel reviewed the copy request did they discover the inadvertent production. At that time, they declined to produce the five documents. Waiver must be voluntary. *See Transamerica Computer v. International Business Machines*, 573 F.2d 646, 651 (9th Cir. 1978). As we noted in our prior order, we do not believe this accidental production to amount to a voluntary waiver.

III

Finally, plaintiffs' request that, should we deny their motion, we certify the issue for immediate appeal to the United States Court of Appeals for the Third Circuit.

Discovery orders are not ordinarily appealable. *See Whisenant v. Adkins*, No. 91-8050, 1991 U.S. App. LEXIS 21209 (September 10, 1991). A certification would require some exceptional circumstance, such as a serious question about some controlling point of law. *See Garner v. Wolfinbarger*, 430 F.2d 1093, 1096 (5th Cir. 1970). We do not find such an exceptional circumstance in this case. The legal standard for determining the applicability of the privilege is not in question and we decline the requested certification.

We will issue an appropriate order.

/s/William W. Caldwell
United States District Judge

Date: January 29, 1993

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 1:CV-90-1072

REDLAND SOCCER CLUB, INC., DEAN G. NEWHOUSE, RICHARD V. SPONG, SR., ROBERT E. KANE, and JACK H. HERSHBERGER, et al.,

Plaintiffs

vs.

DEPARTMENT OF THE ARMY OF THE UNITED STATES OF AMERICA, and THE UNITED STATES OF AMERICA,

Defendants

CIVIL ACTION NO. 1:CV-90-1073

ROBERT C. O'NEAL, Individually and as Representative of the Estate of Florence M. O'Neal, Decedent, et al.,

Plaintiffs

vs.

DEPARTMENT OF THE ARMY OF THE UNITED STATES OF AMERICA, and THE UNITED STATES OF AMERICA,

Defendants

ORDER

AND NOW, this 29th day of January, 1993, upon consideration of plaintiffs' motion to compel, it is ordered that the motion is denied.

/s/William W. Caldwell
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 1:CV-90-1072
REDLAND SOCCER CLUB, INC., DEAN G. NEWHOUSE, RICHARD V. SPONG, SR., ROBERT E. KANE, and JACK H. HERSHBERGER, et al.,

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DEPARTMENT OF THE ARMY OF THE UNITED STATES OF AMERICA, and THE UNITED STATES OF AMERICA,

Defendants

MEMORANDUM

We are considering defendants' motion for judgment on the pleadings or, in the alternative, partial summary judgment. Plaintiffs allege certain violations of both federal and state environmental laws[1] and seek both damages and injunctive relief. We have previously dismissed claims for a medical monitoring fund pursuant to CERCLA and for injunctive relief pursuant to the Federal Tort Claims Act. We will con-

1. The suit is brought under the federal Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. 9601 *et seq.*, and the Pennsylvania Hazardous Sites Cleanup Act ("HSCA"), 35 Pa. Cons. Stat. §§6020.101-6020.1305.

sider in turn each of the issues raised in defendants' current motion.

I. *Timing of Review and 42 U.S.C. §9613(h)*

Defendants request that we dismiss plaintiffs' citizen suits[2] because we have no subject matter jurisdiction to hear such claims, that jurisdiction being expressly limited by 42 U.S.C. §9613(h).

A. *Claims Under CERCLA*

We agree with defendants' assertion that the proper point at which to begin statutory analysis is the plain language of the statute. *In Re* Continental Airlines, Inc., 932 F.2d 282, 287 (3d Cir. 1991). We disagree, however, with defendants' characterization of 42 U.S.C. §9613(h) as "plain and unambiguous."[3] The language of the statute is susceptible to at least two interpretations. The interpretation that defendants offer is that the use of the past tense in §9613(h)(4) is intended to divest federal courts of jurisdiction over any suit *involving* a site currently being investigated or cleaned up under CERCLA provisions. *Werlein v. United States*, 746 F. Supp. 887,

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2. 42 U.S.C. §9659, entitled "Citizens Suits," allows that "any person may commence a civil action on his own behalf ..." to enforce the provisions of CERCLA.

3. The text of the statute is as follows:

> No Federal court shall have jurisdiction under Federal law other than under section 1332 of Title 28 ... or under state law which is applicable or relevant and appropriate under section 9621 of this title ... to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title, in any action except one of the following:
>
> (1) An action under section 9607 of this title to recover response costs or damages or for contribution.
>
> (4) An action under section 9659 of this title (relating to citizens suits) alleging that the removal or remedial action taken under section 9604 of this title ... was in violation of any requirement of this chapter. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the cite.

42 U.S.C. §9613(h).

892 (D. Minn. 1990). Another interpretation is that "challenges" as used in the statute refers to suits that question the propriety of Environmental Protection Agency ("EPA") actions taken under CERCLA. Plaintiffs contend that their suits are not challenges to so much as supplementations of CERCLA actions. Viewed in that light, plaintiffs' actions could be seen as parallel cleanup attempts and not challenges at all.

We believe that defendants are correct that the general purpose of §9613 is to narrow federal jurisdiction. *Werlein, supra.* The broad language of the statute indicates such an intent, as does reference to the legislative history:

> It is my understanding that under [§9613(h)], no person may bring any lawsuit in any Federal court regarding a federally approved removal or remedial action except when the removal action has been completed or when the remedial action has been taken or secured. "Taken or secured" means that all of the activities set forth in the record of decision which includes the challenged action have been completed. Moreover, there is to be no review of a removal action when there is to be a remedial action at the site. Thus, for example, review of the adequacy of a remedial investigation and feasibility study, which is a removal action, would not occur until the remedial action itself had been taken.

132 Cong. Rec. 28,440-41 (1986) (statement of Sen. Thurmond).

Both the plain language and the legislative history indicate a broad congressional intent that federal courts not hear such challenges until the remedial actions are complete.

Plaintiffs rely on one of the exceptions to §9613(h) for the proposition that their private cause of action under §107 of CERCLA is exempted from those dictates. Section 9613(h)(1) allows "an action under section 107 to recover response costs or damages or for contributions." Section 107 allows a private right of action. *McGregor v. Industrial Excess Landfill, Inc.*,

709 F. Supp. 1401, 1409 (N.D. Ohio 1987). However, courts have widely held that that right of action is for private persons to recover monies they have expended to clean up sites or to prevent further releases of hazardous chemicals. As we noted in an earlier memorandum in this case, " 'medical surveillance, health effect studies, and health assessments' are not recoverable response costs under CERCLA." *Ambrogi v. Gould, Inc.*, 750 F. Supp. 1233, 1246 (M.D. Pa. 1990) (Conaboy, J.). Plaintiffs in the instant case have not alleged that they have paid for any of the remedial actions contemplated by CERCLA. The private cause of action afforded by §107 and referred to in §9613(h)(1) simply does not include claims of the type plaintiffs here offer. *See also, Daigle, et al v. Shell Oil and United States*, 1992 U.S. App. LEXIS 19273 (10th Cir. August 18, 1992). Therefore, as the exception does not apply, we must follow the mandate of §9613(h) and dismiss without prejudice the citizen suit portions of plaintiffs' complaints brought pursuant to CERCLA.

B. *Claims Under HSCA*

We are convinced that the same analysis holds true for those parts of the actions brought under 35 Pa. Cons. Stat. §6020.101, *et seq.* (the HSCA) for injunctive relief. The plain language of the statute divests federal courts of jurisdiction over actions" ... under State Law ..." 42 U.S.C. §9613(h). Several courts have assumed that claims brought under state environmental protection statutes must be dismissed along with CERCLA claims where §9613(h) applies. *Werlein, supra*, at 894; *North Shore Gas Co. v. EPA*, 753 F. Supp. 1413 (N.D. Ill. 1990), *aff'd*, 930 F.2d 1239 (7th Cir. 1991). Were we to do otherwise, we would frustrate the legislative intent behind §9613(h).

II. *Alleged Waiver of Sovereign Immunity*

Plaintiffs argue that the United States has waived its sovereign immunity in 42 U.S.C. §9620(a)(4). It is clear from the plain language of the statute that §9620(a)(4) allows suits

against the United States pursuant to state environmental statutes. It is, however, unclear whether that provision waives sovereign immunity for cleanups only at sites currently owned or operated by the United States or whether it also waives it for sites owned or operated *at the time of the contamination.* We begin our analysis with the rule that parties bringing actions against the United States bear "the burden of demonstrating an unequivocal waiver of immunity." *Mitchell v. United States,* 787 F.2d 466, 467 (9th Cir. 1986).

The Redland complaint alleges that the Army retains control of Marsh Run Park. Redland First Amended Complaint at ¶191. Were this the case, there would clearly be a waiver of sovereign immunity. The applicable sentence of §9620(a)(4) is in the present tense: "... at facilities owned or operated ..." The next sentence within the same paragraph is undisputably in the present tense: "... to facilities which are not owned or operated ..." Plaintiffs claim that the first sentence is actually phrased in the past tense, thereby allowing imposition of liability for past owners or operators. Common sense and the rules of grammar belie such an assertion. We believe the plain language to mean facilities *currently* owned or operated.

Plaintiffs cite *FMC Corp. v. United States Dep't of Commerce,* 786 F. Supp. 471 (E.D. Pa. 1992) as authority to the contrary. We find no merit to this argument. In *FMC Corp.*, the court examined federal liability under CERCLA, not under HSCA. It is reasonable to assume that Congress intended broader federal liability under CERCLA than under state environmental statutes. We conclude that the waiver of sovereign immunity in 42 U.S.C. §9620(a)(4) applies to facilities *currently* owned or operated by the United States.[4]

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4. We are bolstered in this conclusion by the language of §9607(a)(2), which specifically places liability on "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of ..." If Congress had intended §9620(a)(4) to mean the same thing, it clearly knew what language to use.

Plaintiffs assert that dismissal on the pleadings is precluded by their assertion that the Army "assumed possession and control of [Marsh Run Park]" and its implication that Army control continues. We must accept all well-pleaded allegations in the complaint as true and construe them in the light most favorable to plaintiffs. We agree that this precludes dismissal under Fed. R. Civ. P. 12(c). We turn, then, to an examination under the summary judgment standard. *Bank of Nova Scotia v. Equitable Financial Management*, 882 F.2d 81, 83 (3d Cir. 1989).

Defendants argue that Fairview Township is now the owner of Marsh Run Park, a fact conceded by plaintiffs in their complaints. Redland First Amended Complaint ¶164 ("In 1976, ownership of Marsh Run Park was transferred to Fairview Township under a deed ..."). The question remains, however, whether the Army continues to operate the park.

CERCLA does not specifically define "operator." 42 U.S.C. §9601(20)(A). Courts have developed several tests to determine if a person or entity is an operator. The "Management-Control" test was described in *United States v. Kayser-Roth Corp.*, 916 F.2d 24 (1st Cir. 1990):

> To be an operator requires more than merely complete ownership and the concomitant general authority or ability to control that comes with ownership. At a minimum, it requires active involvement in the activities of the subsidiary.

Id. at 27. It is clear that, to be held liable as an operator, a party must currently participate in decisions regarding the overall operations at a facility. *Riverside Market Dev. Corp. v. Int'l Building Prod., Inc.*, 931 F.2d 327, 330 (5th Cir. 1991); *Mobay Corp. v. Allied-Signal, Inc.*, 761 F. Supp. 345, 353 (D.N.J. 1991).

The parties have offered us nothing beyond bare assertions regarding the involvement of the Army at Marsh Run Park ("... the Army does not operate Marsh Run Park as a recreational facility." Def. Reply Memorandum at 8. "... the Army closed Marsh Run Park, placed a cordon around it, and assumed possession and control of it." Redland First Amended Complaint at ¶191). Without more in the record, we must conclude that there remains a genuine issue as to a material fact, Fed. R. Civ. P. 56(c), and that summary judgment on this issue would be improper.

III. *Claims for Response Costs/Litigation Expenses*

A. *Expert Fees*

Plaintiffs ask that we direct defendants to "pay all costs incurred by Plaintiffs in this litigation, including reasonable attorney and expert witness fees." Redland First Amended Complaint at 46. Defendants first assert that attorney fees are not available as response costs in private-party CERCLA actions, and we find merit in this position. The weight of authority on this point precludes such an award and the legislative history of CERCLA concurs. *Ellman v. Woo,* 1991 WL 274838 at *6 (E.D. Pa. December 16, 1991); *Fallowfield Development Corp. v. Strunk,* 766 F. Supp. 335 (E.D. Pa. 1991).

Plaintiffs also make their requests for attorney fees and expert fees under HSCA, 35 Pa. Cons. Stat. §6020.1115(b). The language of that statute does not support plaintiffs' interpretation. The relevant section, §6020.702(a), allows recovery of "(3) Other reasonable and necessary or appropriate cost of response incurred by any other person." Courts have implied a private cause of action from this provision. *E.g. Toole v. Gould, Inc.,* 764 F. Supp. 985 (M.D. Pa. 1991). It is clear, however, that private recovery is allowed only for "costs of response." We look then at the statute's definition of "re-

sponse." No language in that definition 35 Pa. Cons. Stat. §6020.103, lends credibility to plaintiff's claim for attorney fees. Further, HSCA expressly allows the Commonwealth to recover legal fees. §6020.507(b). Certainly, had it so intended, the legislature could have included a legal fee provision for private suits. It did not and we will not imply one. The request for attorney fees in Counts I and II of both complaints will, therefore, be dismissed.

Plaintiffs also request that defendants bear the cost of plaintiffs' expert witnesses. Defendants argue that fees for expert witnesses are litigation costs, and that they are not compensable under CERCLA. We agree. In *Cook v. Rockwell Int'l Corp.*, 755 F. Supp. 1468 (D. Colo. 1991), the court held that "[a] plaintiff who has incurred no costs, except for litigation expenses, prior to the filing of a CERCLA action has incurred no 'necessary costs of response' under §9607(a)." *Id.* at 1476. Response costs under CERCLA refer to expenses of cleanup, not the expenses of preparing for a lawsuit.

B. *Health Risk Assessments*

Plaintiffs argue that they have incurred great expense for the preparation of formal health risk assessments. For the same reasons we cited earlier, we do not believe Congress intended such costs to be included in "response costs" when it enacted CERCLA. The statutory definition of response is "remove, removal, remedy, and remedial action ..." 42 U.S.C. §9601(25). The definitions of remove, removal, remedy, and remedial action uniformly refer to acts involving cleanup of hazardous sites or assessment of environmental damage at those sites. There is no indication that Congress meant to include health risk assessments in the category of response costs. *Ambrogi v. Gould, Inc.*, 750 F. Supp. 1233, 1247 (M.D. Pa. 1990) (Conaboy, J.); *Coburn v. Sun Chemical Corp.*, 19

Envtl. L. Rep. 20256 (E.D. Pa. 1988).[5] Plaintiffs argue that summary judgment is precluded when there is a claim of specific response costs, citing *Joy, supra.* We find no merit in this argument. Dismissal is appropriate where, as a matter of law, plaintiffs can prove no set of facts in support of their claim that would entitle them to relief. *Labov. v. Lalley,* 809 F.2d 220 (3d Cir. 1987). We find that to be the case here.

We will, accordingly, dismiss the claim for the costs of health risk assessment.

C. Water Provision in O'Neal Complaint

Plaintiffs claim as response costs their expense in supplying water to each of several houses after plaintiffs' wells were determined to be contaminated. As defendants concede, provision of alternative water supplies *is* a recoverable response cost. 42 U.S.C. §9601(23). Defendants offer affidavit testimony of a United States Army chemical engineer that plaintiffs were provided with bottled water at government expense immediately after their wells were found to be contaminated. Aff. of Catherine Johnson at ¶5. Plaintiffs claim to have water procurement costs beyond those covered by the Army. There is, then, a dispute over a material fact that will preclude summary judgment on this issue. Fed. R. Civ. P. 56(c).

We will issue an appropriate order.

/s/William W. Caldwell
United States District Judge

Date: September 15, 1992

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5. Indeed, in another context, plaintiffs cite *Joy v. Louisiana Conference Association of Seventh Day Adventists, et al,* 1992 U.S. Dist. LEXIS 9901 (E.D. La. July 6, 1992). The court in *Joy* noted that necessary response costs are those "expenses incurred by a party seeking to remove or otherwise remedy the hazard." *Id.*

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 1:CV-90-1072

REDLAND SOCCER CLUB, INC., DEAN G. NEWHOUSE, RICHARD V. SPONG, SR., ROBERT E. KANE, and JACK H. HERSHBERGER, et al.,

Plaintiffs

vs.

DEPARTMENT OF THE ARMY OF THE UNITED STATES OF AMERICA, and THE UNITED STATES OF AMERICA,

Defendants

CIVIL ACTION NO. 1:CV-90-1073

ROBERT C. O'NEAL, Individually and as Representative of the Estate of Florence M. O'Neal, Decedent, et al.,

Plaintiffs

vs.

DEPARTMENT OF THE ARMY OF THE UNITED STATES OF AMERICA, and THE UNITED STATES OF AMERICA,

Defendants

ORDER

AND NOW, this 15th day of September, 1992, upon consideration of defendants' motion for judgment on the pleadings or, in the alternative, for partial summary judgment, it is ordered as follows:

1. The motion to dismiss the citizens suits in Counts I and II of the complaints is granted.

2. The motion for partial summary judgment based on sovereign immunity is denied.

3. The motion for dismissal of claims for response costs in Counts I and II is granted in part and denied in part. Those portions of the complaint requesting as CERCLA response costs attorneys fees, expert witness fees, and health risk assessments are dismissed.

4. In all other respects, the motion is denied.

/s/William W. Caldwell
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 1:CV-90-1072

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Plaintiffs

vs.

DEPARTMENT OF THE ARMY OF THE UNITED STATES OF AMERICA, and THE UNITED STATES OF AMERICA,

Defendants

ORDER

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

On July 2, 1992, plaintiffs filed a motion to compel the production of some 139 documents by the defendants.

The defendants have asserted the "Deliberative Process Privilege" as to each document on behalf of the United States Army. This privilege shields from disclosure all matters in-

volved in the give and take or the method by which governmental decisions are considered and reached. Its purpose is to encourage full and candid consideration and discussion of all aspects of a particular matter which might otherwise be inhibited if the details involved in arriving at a decision were to be published to others. The policy consideration involved in the privilege is that if such matters are not shielded, decisions and policies affecting the public may not receive the fullest and frankest consideration and may not be the best resolution of a matter. To be protected the material referred to must be "predecisional" and "deliberative" in nature.

The government has itemized the 139 documents as to which the privilege is claimed. The reference to each document describes them as drafts, recommendations, comments, briefing documents, options for action, or in similar terms.

It is understandable that plaintiffs may wish access to this material but they state no specific or compelling reason to obtain any particular item. Based upon our review of the arguments made and authorities cited we believe the need to protect the predecisional, deliberative process in government decision making outweighs the general desire of plaintiffs to view this material as part of discovery. We also agree with defendants that the privilege was not waived by the brief and inadvertent disclosure of a few documents to plaintiffs in the course of document production.[1]

It is ORDERED that plaintiffs' motion to compel discovery, filed July 2, 1992, is denied.

Date: August 13, 1992

/s/William W. Caldwell
United States District Judge

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1. Defendants agree the privilege is waived as to any document in possession of Pa DER.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 1:CV-91-289

THEODORE J. ELLIOTT and FRANCES M. ELLIOTT as parents and natural guardians of TODD ELLIOTT, and TRACEY ELLIOTT, and THEODORE J. ELLIOTT, and FRANCES M. ELLIOTT in their own rights,

Plaintiff

vs.

UNITED STATES OF AMERICA,

Defendant

MEMORANDUM

I. *Introduction*

Plaintiffs, Theodore and Frances Elliott, on behalf of themselves and their minor children, Todd and Tracey, have filed this action against the United States pursuant to the Federal Tort Claims Act (FTCA), 28 U.S.C. §2671, *et seq.* The complaint alleges that Tracey and Todd were injured after being exposed to toxic chemicals that defendant buried at or near Marsh Run Park in Fairview Township, York County, Pennsylvania. Plaintiffs seek damages, including compensation for medical monitoring. Defendant has filed a motion to dismiss and for summary judgment,[1] alleging that plaintiffs' claim is time-barred by the applicable two-year statute of limitations and is not supported by sufficient evidence to establish the essential elements of negligence. We will examine the motion under the well-settled standard. *See Celotex*

1. We will treat the motion as one for summary judgment because it is supported by evidence beyond the pleadings.

Corp. v. Catrett, 477 U.S. 317 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

II. *Background*

On various occasions between the years 1985 and 1987, Tracey and Todd Elliott played at or near the soccer field at Marsh Run Park (the Park). On December 23, 1986, Tracey develop acute lymphoblastic leukemia and, prior to that time, Todd was diagnosed with lymphadenopathy, i.e. enlarged lymph nodes. Todd is presently in good health and has not sustained any medical problems other than enlarged lymph nodes.[2] In the Spring of 1987, plaintiffs heard through "rumors and hearsay" that the United States Army had used the Park as a landfill. This information caused plaintiffs to ask physicians whether any of health problems experienced by Tracey and Todd could be linked to an exposure to toxic chemicals. None of their physicians was able to make a causal connection and plaintiffs were never told that their children's conditions were caused by exposure to chemicals. In fact, some physicians informed plaintiffs that Tracey's leukemia was not caused by exposure to chemicals. In the Summer of 1987, plaintiffs attended a public meeting held by the Army for families in the vicinity of the Park. None of the doctors present was able to "say anything about the health risks at Marsh Run Park" and "no one seemed to really know about the health risks at the time of this meeting." (Plaintiff's Brief, at 4). Nowhere in the record is it specified whether the Army admitted at this time that toxic chemicals were buried at the Park.

The Army closed the Park in August of 1987 and on September 1, 1987, the *Patriot News*, a local newspaper, published an article that the Park was closed based upon a "finding" that hazardous and toxic contaminants were buried there. Plaintiffs allege that they "did not believe the Army

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2. There is no evidence of a malignancy.

would dump anything dangerous in the park" and that Theodore Elliott's co-workers also "thought that the government would never do anything like that." (Plaintiff's Brief at 5). Plaintiffs allege, therefore, that it was not until May of 1988 that they first discovered through "an official statement made by the Department of the Army and released to the public regarding the Marsh Run Park property" that Todd and Tracey had actually been exposed to toxic chemicals. Subsequently, on August 25, 1989, plaintiffs instituted administrative claims with the Army seeking recovery for personal injuries and emotional distress. On August 27, 1990, the claims were denied, and on February 26, 1991, plaintiffs instituted this action.

III. *Discussion*

A. *Statute of Limitations*

First, defendant contends that the complaint is barred by the applicable two-year statute of limitations under the FTCA, 28 U.S.C. §2401(b), because the administrative claim was filed on August 25, 1989, more than two years after plaintiffs became aware, through rumors, that the Park was contaminated. Section 2401(b) of the FTCA provides:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

28 U.S.C. §2401(b). Generally, a claim accrues when the potential claimant either is aware, or should be aware, of the existence of and the source of an injury. *Bayless v. Philadelphia National League Club*, 579 F.2d 37, 39 (3d Cir. 1978). At that point "[t]he burden is on an injured party once he discovers

the cause of his injuries to determine within the statutory period the party's [sic] whose negligence or breach of duty were responsible for the event or condition." *Piccolini v. Simon's Wrecking*, 686 F. Supp. 1063, 1071-72 (M.D.Pa. 1988). What is known as the discovery rule applies when "the plaintiff is unable, despite the exercise of due diligence, to know of an injury or its cause," and the statutory period is tolled until he possesses such knowledge. *McGowan v. University of Scranton*, 759 F.2d 287, 291 (3d Cir. 1985) (citations omitted).

"[O]nce [a plaintiff] possesses the salient facts concerning the occurrence of his injury and who or what caused it, he has the ability to investigate and pursue his claim." *Id.* at 1073 (citations and emphasis omitted). The Supreme Court in *United States v. Kubrick*, 444 U.S. 111, 123-24, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979), stated that the pivotal question in this context is whether the injured party had *sufficient notice* of the invasion of his legal rights to require that he investigate and make a timely claim. Thus, the statute is triggered when plaintiff "possesses sufficient critical facts to put him on notice that a wrong has been committed and *that he need investigate to determine whether he is entitled to redress.*" *Zeleznik v. United States*, 770 F.2d 20, 22 (3d Cir. 1985) (emphasis added). The test is objective and inquires whether a reasonable person in the plaintiff's position knew or should have known both the existence of and cause of the injury. *Barren v. United States*, 839 F.2d 987, 990 (3d Cir. 1988).

Defendant contends that plaintiffs knew or should have known in the Spring of 1987, when the rumors were circulated, that "the United States had historically used Marsh Run Park as a landfill and that some contamination of the soil and water might have occurred." (Defendant's Brief at 7). Defendant argues that when plaintiffs heard the rumors, they were under a duty to investigate and pursue their claim. Plaintiffs counter

that they did not and could not have possessed knowledge of the critical facts that the Park was actually contaminated *and* that health risks were involved until as early as September 1, 1987, when the newspaper article was published.[3] Plaintiffs contend that before that time, their knowledge was based upon mere rumor and they were not "armed with sufficient critical facts" as they received no official information concerning the contamination or its extent, their physicians dispelled any link between the alleged contamination and the health problems at issue, and the Army's doctors were unable to state anything about possible health risks.

"[T]he accrual date is not postponed until the injured party knows every fact necessary to bring his action." *Zeleznik, supra,* 770 F.2d at 23. Moreover, even where the putative plaintiff is incompetently or mistakenly advised or the medical community is divided as to causation, the plaintiff must investigate within the statutory period whether he has a potential claim. *Kubrick, supra,* 444 U.S. at 124. However, the medical community in the present action was not divided, but consistently agreed they could find no causal connection between the health problems at issue and toxic chemicals. *See, Stoleson v. United States,* 629 F.2d 1265, 1270 (7th Cir. 1980) (if "medical science did not recognize a causal connection, [the plaintiff is] powerless to pursue the matter through legal channels").[4]

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3. While plaintiffs agree with the September date, which places this action within the statutory period, they urge that they did not actually possess knowledge of the critical facts until the Army released documented information in May of 1988.

4. *Stoleson* is analogous. The plaintiff experienced chest pains and subsequently sustained a heart attack after working in an Army ammunitions plant, handling certain munitions containing nitroglycerin. The plaintiff suspected that her attack was connected to her working conditions and in 1969 she read a union newspaper article suggesting a link between chest pains and nitroglycerin. In that year, she was also informed by an occupational safety specialist that he believed her exposure to nitroglycerin caused her heart problems. However, physicians informed her in 1968 and 1969 that there was no connection. It was not until May of 1971

As will be discussed *infra*, plaintiff has failed to produce sufficient evidence of causation to withstand summary judgment. Thus, the statute of limitations inquiry will focus upon whether plaintiffs' claim for medical monitoring, which will be resolved at trial, was timely filed. For such claim, the statutory period commences when a reasonable person in plaintiffs' position knew or should have known that their children were exposed to toxic chemicals *and* were at an increased risk of illness in the future. Plaintiff argues that in the Spring of 1987 there was no evidence of contamination occurring and that no physician was able to comment on whether health risks were involved. The crux of this matter is whether the rumors, by themselves, coupled with a lack of information regarding possible health risks, were sufficient to constitute the "salient facts" necessary to trigger the statute.

There is a split of authority whether rumors or unsubstantiated and undocumented information is enough to put a plaintiff on notice that he or she has been injured by another's wrongful conduct. *See, e.g., Dilibert v. United States*, 817 F.2d 1259, 1263 (7th Cir. 1987) ("The hearsay and rumors which

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that the plaintiff was informed by another doctor who performed *seminal* research on the subject that there was a causal connection. The district court dismissed the case on the ground that the plaintiff's claim accrued in 1969 and was time-barred.

The Court of Appeals reversed holding that the plaintiff's suspicions and the opinions and suggestions of others (even according to the newspaper article), coupled with the diagnoses of doctors who could not find a causal connection, were insufficient. Rather, it was not until the plaintiff received documented medical evidence that her "suspicion was ripened into knowledge of the missing critical fact—causation." *Id.* at 1270-71. "[H]ad [the plaintiff] sought competent legal advice [prior to 1971], she would have been informed quite correctly that she had no claim against the government" and to "fix the accrual date [in 1969] would provide [the plaintiff] with nothing more than a delusive remedy." *Id.* In the present case, no doctor has been able to establish that Tracey or Todd's health problems were caused by defendant's alleged waste dumping, or by anyone's wrongful conduct for that matter. Thus, it is arguable that plaintiffs do not yet possess knowledge of the critical facts concerning the cause of their children's injuries to trigger the statute regarding causation.

the plaintiff described in his affidavit were enough to put him on notice of the possible existence of the records at issue here and to impose upon him a duty to inquire into the veracity of those rumors for purposes of bringing an action under the Privacy Act"); *Woodland Private Study Group v. New Jersey Dept. of Environmental Protection*, 616 F. Supp. 794 (D. N.J. 1985) *vacated on other grounds*, 846 F.2d 921 (3d Cir. 1988) ("the correct date for the starting of the one year statute of limitations should be set at the date when plaintiffs were officially notified," not when they were "unofficially informed [ ] of the possibility of contamination"); *Stoleson, supra*, 629 F.3d at 1270 (plaintiff's cause of action did not accrue until she received documented medical evidence of a causal connection between her illness and chemicals, and suggestions about a causal connection or unsubstantiated opinions were not enough to give plaintiff knowledge). However, whether rumors are sufficient to trigger the statute is generally decided on a case by case basis, and depends upon the nature of the rumors.

Plaintiffs argue that the rumors in question were speculative and it is not reasonable for defendant to expect them to have found out more than the Army doctors and their own physicians could tell them. It has been held that a plaintiff should not be charged with having more knowledge than the government itself is able to give the public concerning whether health risks are associated with a certain government activity. *See, e.g., Allen v. United States*, 588 F. Supp. 247 (D.Utah 1984) *reversed on other grounds*, 816 F.2d 1417 (10th Cir. 1987) (the court held that the government's failure to tell persons downwind from a radioactive fallout site what the government knew about the hazards and future health risks involved with such radiation, and because public pronouncements only downplayed or failed to address possible health risks, the plaintiffs were not charged with knowledge of a

connection between radiation and cancer so as to accrue their claims under the FTCA); *Allen v. United States*, 527 F. Supp. 476 (D.Utah 1981) (information provided to mass media as to the effects of radioactive fallout were not substantive or persuasive enough to justify imputing plaintiffs with sufficient knowledge as to cause).

The burden of proof remains at all times with the defendant to establish that the action is time-barred. *Bentley v. Ellam*, 764 F. Supp. 322, 325 (M.D.Pa. 1991). We find that the record is not clear as to the nature of the rumors or whether they carried a sufficient indicia of probity to impose a duty of inquiry or to trigger the statute.[5] Further, it is not clear whether the Army admitted that the Park was contaminated prior to the newspaper article, or whether the alleged contamination could otherwise be verified by a layperson when it was not divulged to the general public until September of 1987.[6] Because we are unable to determine from the record the nature and validity of the rumors, etc., or the extent of the Army's knowledge concerning the possibility of health risks, we conclude that the motion for summary judgment based on the statute of limitations must be denied.

B. *Medical Monitoring*

With regard to plaintiffs' request for future medical monitoring (which is distinguished from "ordinary" damages), ac-

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5. We note that in the event the trier of fact finds that the rumors were not sufficient to trigger the statute, plaintiffs were still under a duty to inquire whether the rumors may have merit. *See, Trieschock v. Owens Corning Fiberglas Co.*, 354 Pa. Super. 263, 511 A.2d 863 (1986) (court found a distinction between the duty to inquire whether there is a cause of one's injury and a duty to investigate into the cause when it is discovered; only the latter triggers the statute). We find that plaintiff satisfied their initial duty to inquire whether there was a cause connected to their children's injuries by inquiring of physicians and attending the public meeting held by the Army.

6. Additionally, neither party has addressed the content or validity of the newspaper article or the Army's news release in the May of 1988.

tual injury need not be shown.[7] T..... issue was analyzed by this Court in *Merry v. Westinghouse Elec. Corp.*, 684 F. Supp. 847 (M.D.Pa. 1988), concluding that "a plaintiff need not exhibit symptoms of a disease before medical surveillance is sought." *Id.* at 849. "Pennsylvania law does [not] require [ ] *physical* injury before a claim for future medical monitoring can be maintained," and "[d]amages may be recovered for the prospective consequences of a tortious injury," whether or not there is evidence of injury at the time of the action. *Id.* (citations omitted). In *Merry* we quoted with approval *Ayers v. Jackson*, 189 N.J. Super. 561, 572-73, 461 A.2d 184, 190 (1983), as follows:

> It is not the reasonable probability of whether plaintiffs will suffer cancer in the future that should determine whether medical surveillance is necessary. Rather, it is whether it is necessary, based on medical judgment, that a plaintiff who has been exposed to known carcinogens at various levels should undergo annual medical testing in order to properly diagnose the warning signs of the development of the disease. If it is necessary, then the probability of the need for that medical surveillance is cognizable as part of plaintiff's claim. If plaintiffs are deprived of any necessary diagnostic services in the future because they have no source of funds available to pay for the testing, the consequences may result in serious, if no fatal illness.

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7. We construe the complaint in the present action as a request for a sum certain to create a monitoring fund, the precise amount to be determined according to the evidence adduced by experts at trial. It is well-settled that "the cost of medical surveillance is a compensable item of damages." *Merry, supra*, 684 F. Supp. at 850 (citations omitted); *Villari v. Terminix International, Inc.*, 663 F. Supp. 727, 735 (E.D.Pa. 1987) ("the cost of future medical monitoring is a proper element of damages whenever medical testimony establishes the need for future monitoring"); Ayers v. Jackson, 106 N.J. 557, 599-600, 525 A.2d 287, 309 (1987).

Id. (citations omitted). Additionally, the Third Circuit has recognized medical monitoring claims under what is referred to as "non-traditional tort law," an accepted theory of liability in this jurisdiction. *In re Paoli Railroad Yard PCB Litigation*, 916 F.2d 829 (3d Cir. 1990) (exposure to toxic substances, absent a showing of present injury, is a recognized tort). "[C]ourts have begun to recognize claims like medical monitoring, which can allow plaintiffs some relief even *absent present manifestation of physical injury.*" *Id.* at 858 (emphasis added).[8]

To establish a medical monitoring fund plaintiffs must prove at trial: (1) exposure to hazardous substances, (2) potential for injury, and (3) need for early detection and treatment. *Merry, supra*, 684 F. Supp. at 850. Defendant has not disputed for purposes of summary judgment that Todd and Tracey played at the Park during the relevant period or that they were exposed to chemicals. The extent of their exposure and risk of future harm, however, must be established. We conclude that the summary judgment will be denied on plaintiffs' medical monitoring claim.

C. *Causation*

We agree with defendant that plaintiffs have failed to present sufficient evidence to establish that their children's health problems were proximately caused by their exposure to toxic chemicals allegedly buried at the Park. Fed.R.Civ.P. 56(c) provides that summary judgment is warranted "against a party who fails to make a showing sufficient to establish the existence

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8. We note that the cost of medical monitoring does not include damages for the treatment of illness or disease, even if detected by medical monitoring. In *Merry, supra*, we distinguished damages for the treatment of disease and the quantitative costs of assessing the health effects on plaintiffs who were exposed to hazardous substances. With regard to the latter, liability is established by showing that the plaintiff was exposed to toxic substances disposed of by the defendant, and that they were at an increased health risk as a result.

of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex, supra*, 477 U.S. at 322-23. *See, Niklaus v. Vivadent, Inc., U.S.A.*, 767 F. Supp. 94 (M.D.Pa. 1991) (to establish a negligence claim pursuant to the FTCA, the plaintiff must show that the defendant's conduct was the proximate cause of his injuries). While causation is ordinarily a question of fact, the question is removed from the factfinder when it is clear that reasonable minds would not differ on the issue, or when there is insufficient evidence to establish a genuine issue of fact. *Ciprut v. Moore*, 540 F. Supp. 817, 820 (E.D.Pa. 1981).

Generally, in cases involving the question of injury, expert testimony is often used, and is sometimes required, to show that to a reasonable degree of medical certainty the injury was proximately caused by the defendant's conduct. In the present action, defendant has submitted the affidavit of Dr. James Harriman Jandl, a physician qualified in the area of blood disorders, who states unequivocally that "[t]here is no medically recognized evidence linking acute lymphatic (lymphoblastic) leukemia with exposure to *any* chemical substances," and the "only known cause of acute lymphatic (lymphoblastic) leukemia is exposure to ionizing radiation." (Jandl Affidavit at ¶6) (emphasis added). He concludes that "[f]or that reason, it is my expert opinion, held with a reasonable degree of medical certainty, that the development of acute lymphatic (lymphoblastic) leukemia by Tracey Elliott cannot be causally linked to an exposure to chemicals alleged to have been buried at Marsh Run Park."

The only evidence submitted by plaintiffs to rebut Dr. Jandl's testimony is the affidavit of Dr. Peter William Wright who avers that "possible causes of leukemia include ... environmental chemicals exposures, including radiation, chemicals and others," and that "childhood leukemia" and leukemia in general has been linked with exposures to certain chemicals,

including those buried at the Park. (Wright Affidavit at ¶'s 5-7). Dr. Wright opined that "[o]n the basis of this information, I would conclude, based on a reasonable degree of medical certainty, that the chemicals listed above found at Marsh Run Park are known to cause cancer, and some have been specifically implicated with acute leukemia, such as that which has affected Tracey Elliott. It is therefore my opinion, based upon a reasonable degree of medical certainty, that the acute lymphocytic leukemia of Tracey Elliott is *related to* her exposure to the above noted chemicals." (Wright Affidavit at ¶'s 9-10) (emphasis added).[9]

We are not convinced that Dr. Wright's affidavit presents sufficient evidence to establish causation or to rebut defendant's expert testimony. In several paragraphs, Dr. Wright refers to "leukemia" in general when associating it to certain chemicals, which is irrelevant to the specific type of leukemia at issue. Moreover, he avers that Tracey's illness is "related to" the chemicals at Marsh Run Park, which is insufficient to contradict Dr. Jandl's conclusions regarding causation. The affidavit fails to state, as it must, that to a reasonable degree of medical certainty Tracey's leukemia was *caused by* her exposure to the chemicals at the Park.

Proximate cause is a vital element in an FTCA negligence claim, and unless the plaintiff can establish that proximate cause exists, the claim cannot withstand summary judgment. *Novak v. United States*, 865 F.2d 718 (6th Cir. 1989) is analogous. The plaintiff's doctor gave an opinion that his dermatomyositis was "related to the [swine flue] vaccine that he had

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9. Defendant contends that Dr. Wright's affidavit (initially filed on May 4, 1992) is unsigned and thus does not constitute sufficient evidence for purposes of denying the motion for summary judgment. *Pension Ben. Guaranty Corp. v. Heppenstall Co.*, 633 F.2d 293, 300 (3d Cir. 1980). We agree. However, on May 19, 1992, plaintiffs re-submitted the affidavit containing Dr. Wright's signature, which we will accept.

received" from defendant. *Id.* at 720. The district court judge concluded that causation was shown "although he was aware of and troubled by the problem and difficulty of demonstrating proximate cause," particularly as there appeared to be no scientific data to support the doctor's opinion that dermatomyositis "is a viral caused disease." *Id.* The Court of Appeals reversed holding that even if the vaccine *could* cause the disease in question, there was no showing that it *did cause* the plaintiff's disease in that particular case. *Id.* at 721. The Court held that an expert's opinion must be "based on a theory that is generally accepted in the relevant scientific community [and] must not be based on speculation or surmise" such as the doctor's statement that the disease "was related to" the vaccine.[10] *Id.* "The burden is on the plaintiff [ ] to establish proximate cause, and because it involves a medical condition or illness, the plaintiff must show by a reasonable degree of medical certainty that the disease was caused by the negligence of the government." *Id.* at 724. An expert's belief as to the possible link between a known disease and a contaminant is insufficient to establish a direct causal relationship between a particular plaintiff's disease and the chemical. *Novak* illustrates that an expert's opinion that a disease is "related to" a contaminant *without more* does not establish the requisite element of proximate cause. Plaintiffs' evidence in the instant case failed in this regard. For the above reasons, summary judgment must be granted in favor of defendant on all claims on behalf of Tracey Elliott, excluding the medical monitoring claim.

Finally, with regard to Todd's enlarged lymph nodes, plaintiffs do not dispute that he is presently and has always been healthy and has never suffered any medical problems,

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10. We note that there is a split of authority whether an expert's opinion must be accepted by the medical or scientific community to be given weight. However, the rule does not effect [sic] the outcome in the present case.

pain or other symptoms as a result of his lymphadenopathy. Todd's physicians have instructed plaintiffs merely to "keep an eye on him," and have confirmed that he is not suffering from any condition other than the size of his lymphs nodes.[11] Thus, plaintiffs' contention that Todd is now at an increased risk of cancer due to his exposure to chemicals is insufficient to establish damages, which may not be recovered absent a showing of some present physical injury. For the above reasons, summary judgment must be granted in favor of defendant on all claims in behalf of Todd Elliott, excluding medical monitoring.

IV. *Conclusion*

Upon consideration of the record and applicable law, we deny summary judgment on the basis of the statute of limitations and as to plaintiff's medical monitoring claim. Defendant is entitled to summary judgment on all other claims.

An appropriate order will issue.

/s/William W. Caldwell
United States District Judge

Date: June 23, 1992

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11. As indicated, Todd has never undergone a biopsy of the lymph nodes, and thus there is no evidence of a malignancy.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 1:CV-91-289

THEODORE J. ELLIOTT and FRANCES M. ELLIOTT as parents and natural guardians of TODD ELLIOTT, and TRACEY ELLIOTT, and THEODORE J. ELLIOTT, and FRANCES M. ELLIOTT in their own rights,

Plaintiff

vs.

UNITED STATES OF AMERICA,

Defendant

ORDER

AND NOW, this 23rd day of June, 1992, upon consideration of defendant's motion for summary judgment, it is ordered as follows:

1. The motion is granted in part and denied in part. Summary judgment is granted in favor of defendant and against plaintiffs on all claims regarding injury, past, present and future medical expenses for treatment, pain and suffering, and emotional distress.

2. In all other respects the motion is denied. The medical monitoring issue will be resolved at trial.

/s/William W. Caldwell
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 1:CV-90-1072

REDLAND SOCCER CLUB, INC., DEAN G. NEWHOUSE, RICHARD V. SPONG, SR., ROBERT E. KANE, and JACK H. HERSHBERGER, et al.,

Plaintiffs

vs.

DEPARTMENT OF THE ARMY OF THE UNITED STATES OF AMERICA, and THE UNITED STATES OF AMERICA,

Defendants

CIVIL ACTION NO. 1:CV-90-1073

ROBERT C. O'NEAL, Individually and as Representative of the Estate of Florence M. O'Neal, Decedent, et al.,

Plaintiffs

vs.

DEPARTMENT OF THE ARMY OF THE UNITED STATES OF AMERICA, and THE UNITED STATES OF AMERICA,

Defendants

MEMORANDUM

I. *Introduction*

We are currently considering defendants' motion pursuant to Fed.R.Civ.P. 12(b)(6) to dismiss plaintiffs' claims for medical monitoring and injunctive relief.[1] Plaintiffs com-

1. Plaintiffs request that a medical monitoring trust fund be provided by defendants "with a sum sufficient to pay for periodic health testing of Plaintiffs to

menced this negligence action alleging that defendants violated federal and state laws by contaminating various properties in the general vicinity of the New Cumberland Army Depot. In considering a motion under Rule 12(b)(6), we must accept as true all the well pleaded allegations of the complaint and construe them favorably to the plaintiffs. We cannot grant the motion unless the plaintiffs can prove no set of facts in support of their claim which would entitle them to relief. *Labov v. Lalley*, 809 F.2d 220 (3d Cir. 1987).

II. *Pennsylvania's Hazardous Sites Cleanup Act*

Defendants argue that plaintiffs' claim for a medical monitoring fund pursuant to Pennsylvania's Hazardous Sites Cleanup Act (HSCA), 35 P.S. §6020.101-6020.1305 (Supp. 1989) must be dismissed because the Act does not provide for a private cause of action for response costs.[2] There is a split of authority in the Middle District of Pennsylvania whether the HSCA allows actions by private parties. We find that it does.

Plaintiffs contend that they are entitled to medical surveillance pursuant to section 702(a)(5) of the HSCA, which provides as follows:

> A person who is responsible for a release or threatened release of a hazardous substance from a site as specified in section 701 is strictly liable for the following response costs and damages which result from the release or threatened release or to which the release or threatened release significantly contributes:
>
> (5) The cost of a health assessment or health effects study.

See 35 P.S. §6020.702(a)(5).

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determine if the significant health risks to which they were exposed as a result of the Army's actions have resulted in any adverse health consequences."

2. The HSCA defines "response costs" as costs necessary "to assess, prevent, minimize or mitigate damage to the public health, safety or welfare." 35 P.S. §6020.103.

In *Lutz v. Chromatex, Inc.*, 725 F. Supp. 258, 265-66 (M.D.Pa. 1989) (Nealon, J.), the court held that section 702 of the HSCA does not create a private remedy for the recovery of response costs. However, we are persuaded by the decisions in *General Electric Environmental Services Inc. v. Envirotech Corp.*, 763 F. Supp. 113, 117 (M.D.Pa. 1991) (Rambo, J.) and *Toole v. Gould, Inc.*, 764 F. Supp. 985, 1000 (M.D.Pa. 1991) (Conaboy, J.), which reject the holding in *Lutz*. In *Toole*, the court stated that:

> after careful consideration of the issues raised by this case, this court rejects the narrow scope of purpose advocated [ ] and instead, embraces the all encompassing remedial approach which includes a private right of action under HSCA. Though the reasoning in the *Lutz* opinions is academically sound and provides a 'degree of analytic neatness,' the result does not achieve the greater good that we believe the General Assembly intended. *See Stepan Chemical*, 544 F. Supp. at 1142. Practical application requires the right of private individuals to bring suit to fulfill the goals of this legislation.

Id. The court further concluded that the Pennsylvania Department of Environmental Resources (DER) is of the position "that a private right is imperative to the successful and efficient enforcement of the HSCA." *Id.; see also General Electric, supra*, 763 F.Supp. at 120 (the court held that the DER is in "favor of finding that the HSCA creates a private cause of action" for response costs).

In the present action, defendants attempt to distinguish *Toole* on the ground that a private right of action exists only pursuant to section 702(a)(3) of the HSCA. We disagree. Defendants infer that by virtue of the specific language of 702(a)(3), which generally provides for causes of action by private citizens, that section 702(a)(5), regarding health assess-

ments and testing, is therefore designed only for government enforcement. However, there is nothing in the language of section 702(a)(5) which precludes private causes of action and it does not specifically delineate which parties, public or private, are entitled to institute an action under the section. Defendants do not cite authority to the contrary. We find that section 702(a)(5) merely designates a specific response cost, and that section 702(a)(3) allows private parties to institute actions for such costs.

In *General Electric, supra*, the court held that "[c]ertainly, the language of §702(a)(3) suggests the creation of a right to recover response costs in private citizens." *Id.* 763 F.Supp. at 117. We disagree with *Lutz* because the court relied, inappropriately, upon a comparison between the HSCA and the Pennsylvania Solid Waste Management Act, 35 P.S.Ann. §§6018.101-6018.1003 (Purdon Supp.1990) (SWMA) to support its conclusion that the HSCA does not provide for private causes of action. *General Electric, supra*, 763 F. Supp. at 120-121. We agree that the HSCA and SWMA are fundamentally different in purpose and effect and thus "the absence of a private right of action in the former should not control whether a court should find such a right of action in the latter." *Id.* at 121. Additionally, the court in *General Electric* recognized that CERCLA has "universally been interpreted as providing a private right of action for the recovery of response costs." *Id.* at 119. We conclude that because we interpret section 702(a)(5) as allowing medical monitoring as a response cost, it follows logically that private parties may pursue such costs under the HSCA pursuant to the general provision of section 702(a)(3). We are not convinced by defendants that Congress intended to allow private parties to institute actions regarding cleanup costs, but not regarding health assessments, which is listed as a specific response cost.

We believe that had Congress intended to limit section 702(a)(5) to government actions, its intent would have been made clear.[3]

Second, defendants argue that because the HSCA is closely modelled after the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §9600, *et seq.*, medical monitoring relief is precluded. It is well-settled that " 'medical surveillance, health effect studies, and health assessments' are *not* recoverable response costs under CERCLA." *Ambrogi v. Gould, Inc.*, 750 F. Supp. 1233, 1246 (M.D.Pa. 1990) (Conaboy, J.). In *Ambrogi*, the court reasoned that the purpose of CERCLA is strictly to facilitate government cleanup of hazardous waste, to impede future releases into the environment. It is not intended to make injured parties whole or to create a general vehicle for toxic tort actions: "Congress did not intend CERCLA to be utilized as a means to recover 'economic loss' for civil damages that a private party may seek as part of a toxic tort action." *Id.* at 1248.

We recognize that to a great extent the HSCA follows the language of CERCLA, but not with regard to medical monitoring. The remedial purpose of the HSCA has consistently been interpreted more liberally than CERCLA with regard to the purpose and nature of response costs. Clearly, the HSCA has added a specific clause extending its goals beyond the cleanup of hazardous waste to include "health assessments and health effect studies," in order to mitigate the damage resulting from toxic waste dumping, i.e. to detect serious illness of those exposed. In enacting the HSCA, the Pennsylvania General Assembly expressly stated that the statute was designed to provide "new remedies" that went beyond the inadequate

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3. Only sections 702(a)(2) and (a)(4) explicitly limit the response costs to damage incurred by the government. Section 702(a)(5) contains no such limitation.

traditional legal remedies, as outlined in CERCLA. 35 P.S. §6020.101(5); *General Electric, supra,* 763 F. Supp. at 115 (the HSCA "should be interpreted liberally to allow the full effect of its remedial purpose to be realized"); *Toole, supra,* 764 F. Supp. at 1000 (the purpose of the HSCA is to protect the health, safety and welfare of the Commonwealth's citizens).[4]

Defendants further argue that plaintiffs' HSCA claim must be dismissed insofar as it "seeks damages for a select group of individuals." We reject this argument in reliance upon our decision in *Merry v. Westinghouse Elec. Corp.,* 684 F.Supp. 847 (M.D. Pa. 1988), where we distinguished damages for the treatment of disease, which is not sought here, and the quantitative costs of assessing the health effects on plaintiffs who were exposed to hazardous substances. *Merry, supra,* 684 F. Supp. at 848.

We conclude that defendants' motion to dismiss will be granted with respect to plaintiffs' medical monitoring claims under CERCLA, but denied with respect to such claims under the HSCA.

III. *Federal Tort Claims Act*

Defendants argue that plaintiffs' claim for medical monitoring is jurisdictionally barred pursuant to the Federal Tort Claims Act (FTCA), 28 U.S.C. §1346, *et seq.* First, defendants contend that medical monitoring does not constitute a claim for damages claim under the FTCA, but rather is a form of

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4. In 1986, Congress amended CERCLA by creating the Agency for Toxic Substances and Disease Registry (ATSDR), 42 U.S.C. §9604(i)(1), which provides for "medical care and testing" for exposed individuals and "survey and screening programs to determine relationships between exposure to toxic substances and illness." 42 U.S.C. §9604(i)(1)(D)(E). Thus, "medical testing and monitoring is provided for under the terms of CERCLA by petitioning the ATSDR for a health assessment study." *Ambrogi, supra,* 750 F. Supp. at 1249. As the HSCA does not contain a similar provision, it is implied that the Act is already equipped to deal with health assessments, and thus does require an amendment.

prospective equitable relief. Second, they allege that plaintiffs have failed to demonstrate actual injury to support an FTCA claim.

It is not disputed that the government waives its sovereign immunity under the FTCA in "civil actions on claims ... for money damages ... for injury or loss of property, or personal injury." 28 U.S.C. §1346(b). The question in the present action is whether plaintiffs' claims for medical surveillance are damages or injury under the Act.

Defendants cite a series of cases suggesting that medical monitoring is equitable in nature, and thus does not constitute a claim for damages under the FTCA. However, the plaintiff in each case specifically requested that medical monitoring be in the form of an injunction. *See e.g., Linkous v. Medtronic,* No. 84-1909, 1985 U.S. Dist. LEXIS (E.D.Pa. Sept. 4, 1985) ("plaintiffs ***seek equitable relief*** in the nature of a court requiring the defendant to provide and pay for [ ] medical monitoring") (emphasis added). Upon consideration of the cases listed by defendants, we find that they do not hold that medical monitoring is equitable relief *per se.*[5] In those cases the plaintiffs specifically requested equitable relief and the nature of

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5. Defendants cite *Burke v. United States,* CV-F-89-455-DLB, mem.op. (E.D.Cal., April 15, 1991) in which the court held the medical monitoring was equitable, and thus impermissible under the FTCA. First, we are not bound by *Burke,* which is based upon California tort law, which "has not yet recognized a cause of action for medical monitoring." *Burke* at 6. Regardless, *Burke* is clearly distinguishable. In *Burke* the plaintiffs failed to offer expert testimony of any kind to quantify the plaintiffs' chances of contracting disease due to exposure. Thus, the plaintiffs' claim was purely speculative and insufficient to create an issue for trial. As indicated in *Merry, supra,* the plaintiff must "through their export [sic] reports, [at least] create [ ] an issue of fact as to the probability of contracting a serious illness as a result of exposure to the hazardous substances." *Id.* 684 F. Supp. at 852. Second, the plaintiffs in *Burke* requested that the defendants "monitor plaintiffs' medical condition and provide future services for future problems which may occur." *Burke* at 5. Clearly, such claim is for equitable relief and cannot be compared to plaintiffs' claim in the instant case, i.e. for the cost of medical monitoring as proved at trial.

the relief was not at issue. In the present action, plaintiffs do not request an equitable remedy and defendants cite no authority to suggest that plaintiffs are precluded from seeking the cost of medical surveillance as damages.

It is well-settled that "the cost of medical surveillance is a compensable item of damages." *Merry, supra,* 684 F. Supp. at 850 (citations omitted). In fact, on May 3, 1991, in our memorandum and order denying plaintiffs' motion for reconsideration of a class certification request, we held that "medical monitoring could be established as part of each individual claimant's damage claim ... the size of the fund should be determined according to those individual needs." "[T]he cost of future medical monitoring is a proper element of damages whenever medical testimony establishes the need for future monitoring." *Villari v. Terminix International, Inc.,* 663 F. Supp. 727, 735 (E.D.Pa. 1987). "The cost of medical surveillance is a compensable item of damages" and such claim "seeks reimbursement for the specific dollar costs of periodic examinations that are medically necessary notwithstanding the fact that the extent of plaintiffs' impaired health is unquantified." *Ayers v. Jackson,* 106 N.J. 557, 599-600, 525 A.2d 287, 309 (1987).

We construe plaintiffs' complaint against defendants as a request for a sum certain to create a monitoring fund, the precise amount to be determined according to the evidence adduced by experts at trial.[6] For that reason, defendants' motion to dismiss plaintiffs' claims for medical monitoring on the basis of the FTCA will be denied.

Second, defendants argue that the FTCA is not applicable absent a showing of actual injury. They allege that plaintiffs

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6. The appointment of a trustee and administrative guidelines to aid in the functioning and maintenance of the fund would, if granted by this court, be a responsibility of the plaintiffs, not the defendants.

have failed to establish that they were injured by defendants' conduct, but rather seek monitoring based upon the speculation that they may have been harmed or that there is a probability of serious illness in the future. Despite a split of authority among Pennsylvania trial courts on the subject, we analyzed the question extensively in *Merry, supra*, concluding that "a plaintiff need not exhibit symptoms of a disease before medical surveillance is sought." *Merry*, 684 F. Supp. at 849. "Pennsylvania law does [not] require[ ] *physical* injury before a claim for future medical monitoring can be maintained," and it is well-established that "[d]amages may be recovered for the prospective consequences of a tortious injury," whether or not there is evidence of injury at the time of the action. *Id.* (citations omitted).[7] In *Merry* we quoted with approval *Ayers v. Jackson*, 189 N.J. Super. 561, 572-73, 461 A.2d 184, 190 (1983), as follows:

> It is not the reasonable probability of whether plaintiffs will suffer cancer in the future that should determine whether medical surveillance is necessary. Rather, it is whether it is necessary, based on medical judgment, that a plaintiff who has been exposed to known carcinogens at various levels should undergo annual medical testing in order to properly diagnose the warning signs of the development of the disease. If it is necessary, then the probability of the need for that medical surveillance is cognizable as part of plaintiff's claim. If plaintiffs are deprived of any necessary diagnostic services in the future because they have no source of funds available to pay for the testing, the consequences may result in serious, if no fatal illness.

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7. As indicated, plaintiffs do not seek damages for the treatment of illness or disease which may be detected by medical surveillance. Rather, they seek only that the costs of testing be provided by defendants.

Id. (citations omitted). Additionally, the Third Circuit has recognized medical monitoring claims under what is referred to as "non-traditional tort law," an accepted theory of liability in this jurisdiction. *In Re: Paoli Railroad Yard PCB Litigation*, 916 F.2d 829 (3d Cir. 1990) (exposure to toxic substances, absent a showing of present injury, is a recognized tort). "[C]ourts have begun to recognize claims like medical monitoring, which can allow plaintiffs some relief even *absent present manifestation of physical injury.*" *Id.* at 858 (emphasis added).

We conclude that plaintiffs' claim for medical monitoring under the FTCA should not be dismissed. However, to the extent that the complaint seeks injunctive relief under the FTCA, such claim will be dismissed.

An appropriate order will issue.

/s/William W. Caldwell
United States District Judge

Date: February 12, 1992

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 1:CV-90-1072

REDLAND SOCCER CLUB, INC., DEAN G. NEWHOUSE, RICHARD V. SPONG, SR., ROBERT E. KANE, and JACK H. HERSHBERGER, et al.,

Plaintiffs

vs.

DEPARTMENT OF THE ARMY OF THE UNITED STATES OF AMERICA, and THE UNITED STATES OF AMERICA,

Defendants

CIVIL ACTION No. 1:CV-90-1073

ROBERT C. O'NEAL, Individually and as Representative of the Estate of Florence M. O'Neal, Decedent, et al.,

Plaintiffs

vs.

DEPARTMENT OF THE ARMY OF THE UNITED STATES OF AMERICA, and THE UNITED STATES OF AMERICA,

Defendants

ORDER

AND NOW, this 12th day of February, 1992, upon consideration of defendants' motion to dismiss claims for medical monitoring and injunctive relief in Counts I-IV of plaintiffs' amended complaint, it is ordered as follows:

1. The motion is granted in part and denied in part. Portions of Count I requesting a medical monitoring fund pursuant to CERCLA are dismissed.

2. All claims requesting injunctive relief pursuant to the FTCA are dismissed.

3. In all other respects the motion to dismiss is denied.

/s/William W. Caldwell
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 1:CV-90-1072

REDLAND SOCCER CLUB, INC., DEAN G. NEWHOUSE, RICHARD V. SPONG, SR., ROBERT E. KANE, and JACK H. HERSHBERGER,

Plaintiffs

vs.

DEPARTMENT OF THE ARMY OF THE UNITED STATES OF AMERICA, and THE UNITED STATES OF AMERICA,

Defendants

MEMORANDUM

On March 4, 1991, we issued a memorandum and order denying plaintiffs' motion for class certification. On March 13, 1991, plaintiffs filed a motion for reconsideration of that order, or, in the alternative, certification of our decision for interlocutory appeal pursuant to 28 U.S.C. §1292(b), and this memorandum addresses that motion.

This is a negligence action in which plaintiffs allege that defendants violated federal and state laws by contaminating various properties in the general vicinity of the New Cumberland Army Depot. In our March opinion, we concluded that due to the variance in alleged exposures among the proposed class members, an inquiry into each member's activities at and in proximity to the sites in question will be required. We explained that before monetary damages may be addressed plaintiffs must prevail on the issue of liability. Defendants' liability cannot be determined generally, and the extent to which a plaintiff may have been exposed to toxins, and whether an injury has resulted, must be established on an individual basis.

Plaintiffs agree that each individual claimant will be required to prove causation before being entitled to damages, but argue that they should not have to prove causation on an individual basis to establish defendants' liability. Rather, plaintiffs propose that we allow the testimony of a few representative plaintiffs to show that others of the plaintiffs have experienced exposure to toxins. Plaintiffs allege that such representatives can show that defendants' conduct has caused a serious health risk to some of the class members, and, on that ground, the defendants' liability in this matter can be established.

We believe that plaintiffs may have misconstrued our discussions with counsel as well as the rationale in our March decision. To clarify our ruling, we must distinguish between "liability" and "responsibility" for purposes of this action. Liability necessarily involves causation and injury, which we indicated cannot be determined on anything other than an individual basis. Defendants will be liable to individual claimants to the extent each can prove exposure to toxins to a significant degree. To determine defendants' responsibility, on the other hand, the jury must examine: 1) whether defendants in fact disposed of hazardous waste on the site in question, 2) the extent of the contamination, and 3) the possible health risks involved.

In the first phase of trial, plaintiffs may use a representative claimant for the purpose of establishing what sites, if any, have been contaminated by defendants. Much of the relief sought in the complaint is remedial action at affected sites. If defendants' responsibility is proven, which need not be done on an individual basis, defendants would be directed to comply with CERCLA and HSCA clean-up standards. Additionally, defendants' responsibility, if established, would become a proven fact, and defendant would be barred by collateral estoppel from relitigating this issue in individual cases.

Subsequently, to establish injury causation, which is a vital element of the liability and damage phase,[1] plaintiffs must come forward individually with their claims of how, when, and where they were exposed to toxins and with what results. Due to the variety of circumstances involved in each plaintiff's contact with the area, we concluded that it is impossible to provide reasonable averages and/or estimates concerning the length of time and manner in which each plaintiff may have been exposed to and/or injured by hazardous substances.

We note that plaintiff cites cases which hold that liability can be established on a class-wide basis. *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434 (3d Cir. 1977); *In re School Asbestos Litigation*, 789 F.2d 996 (3d Cir. 1986). However, we find that these holdings are fact specific and inapplicable to this case. Moreover, plaintiffs previously cited these cases in their reply brief in support of their motion for class certification. In our March decision we recognized the issues presented in *Bogosian* and *Asbestos School Litigation* and found that a mass tort action, such as the present one, is ill-suited for class certification. We conclude that plaintiff has presented no new law or facts which warrant reconsideration of our denial of class certification.

A second issue raised by plaintiffs concerns whether the creation of a medical monitoring fund may be ordered via an injunction, and be determined on a class-wide basis, rather than as a part of the damage portion of individual claims. Our last memorandum indicates that to establish a medical monitoring fund plaintiffs must prove: (1) exposure to hazardous substances, (2) potential for injury, and (3) need for early detection and treatment. *Merry v. Westinghouse Electric Corporation*, 684 F.Supp. 847, 850 (M.D. Pa. 1988). We empha-

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1. In this matter, defendants cannot be held liable to the proposed class as a whole, absent a showing of individual injury, which will occur in the damage phase of trial. Thus, liability and damages, for purposes of this action, are, in essence, combined.

sized that each element demonstrates a need for individualized inquiry. Plaintiffs contend that elements (2) and (3) can be established for purposes of the class through expert testimony, which will show that the toxins released by defendants pose a serious risk to persons exposed beyond a specified level, and that early detection is necessary for the treatment of potential health problems. On this premise, plaintiffs contend that a mandatory injunction directing defendants to establish a monitoring fund can be readily fashioned. This argument, while facially logical, again misconstrues the reasoning in our earlier decision.

Plaintiffs suggest that the Court order that defendants establish a monitoring fund and appoint a trustee. Individuals who wished to be covered by the fund could be directed to submit proof to the trustee that they were exposed to toxins at the minimum level specified by expert testimony. Plaintiffs further argue that to require each individual to provide expert testimony would be too cumbersome and would render a medical monitoring fund unworkable.

We do not find plaintiffs' suggestions feasible in this matter because, as stated in our previous decision, at this point there is no feasible means by which to determine the funding required for such a program. Our conclusion does not place an undue burden on the plaintiffs, because the amount required for medical monitoring could be established as part of each individual claimant's damage claim. This question necessarily involves the same facts and issues, such as level of exposure and the need for early detection and treatment. These factors cannot be determined through the testimony of a few representatives because each plaintiffs' need for monitoring will be different, and the size of the fund should be determined according to those individual needs. Again, plaintiff has not presented new law or facts regarding the issue of medical monitoring.

Alternatively, plaintiffs request that this Court certify the class certification and monitoring fund issues, as outlined above, for interlocutory appeal. In order to certify those questions under 28 U.S.C. §1292(b), the following elements must be met:

> The order must (1) involve a 'controlling question of law,' (2) offer 'substantial ground for difference of opinion' as to its correctness, and (3) if appealed immediately 'materially advance the ultimate termination of the litigation.'

Katz v. Carte Blanche Corp., 496 F.2d 747, 754 (3d Cir. 1974), *cert. denied* 419 U.S. 885 (1974).

We cannot agree with plaintiffs that the above criteria are met in this case. First, we do not find that the above issues involve "controlling questions of law." We recognize that under certain factual circumstances a defendant's liability may be determined on a class-wide basis and also that monitoring funds may be created via an injunction. However, we have denied class certification on the above issues, not as a matter of law, but based upon the specific facts of this case. This is not to suggest that a medical monitoring fund could never be established on behalf of a class. If all plaintiffs were exposed to toxins for the same amount of time, and in the same manner, our holding might be different. Rather, as indicated, our conclusion in this matter is fact intensive, and does not set a precedent. Moreover, because §1292(b) gives "broad discretion to the district court to revise its class action determination at any time prior to the decision on the merits" then "the determination, in and of itself, does not present a 'controlling question of law.' " *Link v. Mercedes-Benz of North America, Inc.*, 550 F.2d 860, 863 (3d Cir. 1977).

We need not discuss whether plaintiffs have satisfied the remaining elements set forth in *Katz, supra,* because each of the above prongs must be met before a case can be certified

for interlocutory appeal.[2] We acknowledge that the Court in *Katz* stated that "appeals certified pursuant to §1292(b) are appropriate for testing whether suitability of class action treatment has been correctly determined." *Id.* 496 F.2d at 756. However, a district court should not certify a class certification question for interlocutory appeal "without stating persuasive reasons why the particular class action question is so unusual as to demand intervention of an appellate court." *Link, supra,* 550 F.2d at 863. Although the facts of this case are distinct from other mass tort cases, they are not so unusual to warrant an interlocutory appeal. The Third Circuit has a "well-established policy disallowing interlocutory appeals relating to class determination absent special circumstances."[3] *Sullivan v. Pacific Indem. Co.*, 566 F.2d 444, 445 (3d Cir. 1977); *Kramer v. Scientific Control Corp.*, 534 F.2d 1085, 1087 (3d Cir. 1976). In conclusion, we acknowledge that the Third Circuit has allowed certain interlocutory appeals of class action determinations, but it has done so only when the requirements of §1292(b) have been satisfied. As indicated, plaintiffs have not met those requirements in this matter.

For the above reasons we must deny plaintiffs' motions for reconsideration and for certification to permit an interlocutory appeal.

An appropriate order will be entered.

/s/William W. Caldwell
United States District Judge

Date: May 3, 1991

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2. Without addressing whether controlling questions of law are involved in the medical monitoring issue, we find that resolution on appeal of such issue would not materially advance the termination of this litigation. Individual claimants would still be required to prove their entitlement to monitoring in the "second phase" of trial, as plaintiffs suggest.

3. An example of a "special circumstance" is: when the denial of class certification causes the "death knell" of an action because of the small size of the individual claims. *See Hackett v. General Host Corp.*, 455 F.2d 618, 621 (3d Cir. 1972).

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 1:CV-90-1072

REDLAND SOCCER CLUB, INC., DEAN G. NEWHOUSE, RICHARD V. SPONG, SR., ROBERT E. KANE, and JACK H. HERSHBERGER,

Plaintiffs

vs.

DEPARTMENT OF THE ARMY OF THE UNITED STATES OF AMERICA, and THE UNITED STATES OF AMERICA,

Defendants

ORDER

AND NOW, this 3rd day of May, 1991, upon consideration of plaintiffs' motion for reconsideration, it is ordered that the motion is denied. It is further ordered that plaintiffs' request to certify the Order of March 4, 1991, for appeal to the Court of Appeals for the Third Circuit, is denied.

/s/William W. Caldwell
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 1:CV-90-1072

REDLAND SOCCER CLUB, INC., DEAN G. NEWHOUSE, RICHARD V. SPONG, SR., ROBERT E. KANE, and JACK H. HERSHBERGER,

Plaintiffs

vs.

DEPARTMENT OF THE ARMY OF THE UNITED STATES OF AMERICA, and THE UNITED STATES OF AMERICA,

Defendants

MEMORANDUM

I. *Introduction*

Currently pending is plaintiffs' motion for class certification. Plaintiffs allege that defendants violated federal and state laws by contaminating the areas surrounding the New Cumberland Army Depot. They assert that this action will involve class members numbering in the thousands, who were allegedly injured or exposed to a substantial risk of harm due to defendants disposal of toxic and hazardous waste into Marsh Run Park, Marsh Run Creek, and adjoining lands.

II. *Background*

Plaintiffs seek certification of four subclasses: 1) persons who utilized Marsh Run Park for soccer related activities, 2) township employees who performed service at Marsh Run Park, 3) residents of the immediate area of Marsh Run Park and Marsh Run Creek, and 4) persons, including those in other

subclasses, who have filed claims against defendants under the Federal Tort Claims Act ("FTCA"). The majority of relief sought by plaintiffs is injunctive and declaratory in nature, and involves a request to establish a medical monitoring fund and to order the clean up of the contaminated areas.[1] Plaintiff seeks monetary damages only on behalf of specific subclasses who have been allegedly injured or exposed to a substantial health risk.

III. *Rule 23(a)—Prerequisite to Class Certification*

The disposition of the present motion is governed by Federal Rule of Civil Procedure 23. The party moving for class certification first has the burden of satisfying each of the requirements of Fed. R. Civ. P. 23(a) which provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative party are typical of the claims or defenses of the class, and (4) the representative party will fairly and adequately protect the interests of the class.

Plaintiffs must also demonstrate two implicit requirements that an identifiable class exists, and that the proposed representatives are members of the class. *See In re "Agent Orange" Product Liability Litigation*, 506 F.Supp. 762, 788 (E.D.N.Y. 1980); 7 C. Wright, A. Miller and M. Kane, *Federal Practice and Procedure* §§1760-61. The latter requirement is easily

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1. Plaintiffs seek injunctive relief and response costs under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §9601 *et seq.* (Count I), injunctive relief under the Pennsylvania Hazardous Sites Cleanup Act ("HSCA"), 35 P.S. §6020.101, *et seq.* (Count II), and injunctive relief and monetary damages under the Federal Torts Claims Act ("FTCA"), 28 U.S.C. §§1346(a), 2671-80 (Counts III-V).

met, as the representatives themselves have been involved in soccer related activities at Marsh Run Park or are residents in the immediate vicinity.

Defendants contend that plaintiffs are unable to establish an identifiable class with respect to families of soccer players or what constitutes "the immediate vicinity" of Marsh Run Park and Marsh Run Creek. We are not convinced that plaintiffs have failed to establish identifiable classes. Plaintiffs have already identified the township personnel who worked at Marsh Run Park, the class members who filed FTCA claims, and the landowners adjacent to the alleged contaminated areas. Those who played soccer, and their immediate families who observed games at Marsh Run Park, are also an identifiable class which can feasibly be determined by soccer club enrollment records. Plaintiffs also propose to submit expert evidence on the duration and nature of each players exposure to toxins to determine their standing as a class member.

We rely on our earlier decision in *Caruso v. Celsius Insulation Resources, Inc.*, 101 F.R.D. 530, 533 (M.D. Pa. 1984) in which we held that "certainly [formaldehyde foam insulation] users and/or those exposed to [the insulation] are an identifiable class." *Id.* 101 F.R.D. at 533. The description of subclasses need only be "[s]ufficiently definite so that it is administratively feasible for the Court to determine whether a particular individual is a member ... [a]nd not defined so broadly that it encompasses individuals who have little connection with the claim being litigated." 7A Wright, Miller & Kane, *Federal Practice and Procedure*, §1760 at 121, 123.[2] Defendants also argue that plaintiffs' estimates as to potential class members is conclusory. However, we have noted in *Caruso*

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2. We note that a district court has discretion to either limit or redefine subclasses based on information gathered during discovery by the parties.

that greater specificity at this stage in the proceeding is not required. *Id.* at 533.

We find that plaintiff's proposed subclasses meet the impracticability, numerosity, commonality, typicality, and adequacy of representation requirements set forth in Rule 23(a). To satisfy Rule 23(a)(1), plaintiffs must show that "the class is so numerous that joinder of all members is impracticable." As noted, plaintiffs allege that the proposed class involves potentially thousands of individuals, including each soccer player who played during the years of the alleged contamination, and their respective families who also engaged in activities at the site. Defendants contend that there is little, if any, difficulty in joining members of each subclass, such as the 12 members of the "township workers" subclass. However, defendants disregard the impracticability of joining the proposed "soccer players" subclass. Rather, defendants espouse the concept that only individuals who have filed FTCA administrative claims may be considered class members, because the complaint, in part, alleges violations of the FTCA. This argument has no merit when considered under Rule 23(a), however, because there are other subclasses who raise claims beyond the FTCA. We look to the overall class, not the separate subclasses, to support our conclusion that joinder of all proposed class members would be impracticable.

Defendants concede that Rule 23(a)(2) has been met by plaintiffs and that a common issue of law or fact exists with respect to each member of the class—*i.e.* defendants' activities at the New Cumberland Army Depot. Defendants, however, contend that plaintiffs have failed to satisfy Rule 23(a)(3) which requires the claims or defenses of the representative parties to be typical of the claims or defenses of the class. *Caruso, supra,* 101 F.R.D. at 543; *Susquehanna v. H and M, Inc.*, 98 F.R.D. 658, 665 (M.D. Pa. 1983). Defendants assert that typicality of claims cannot be determined because plain-

tiffs have not alleged any specific injuries that they have suffered or that they are at any increased risk.[3] We disagree. Again, we refer to our opinion in *Caruso* in which we held that:

> ... [A] liberal construction may be applied to find typicality as long as no express conflict between the representative party and the class exists, ... and the focus of the court's inquiry should be to establish the defendants wrongful conduct, not to prove facts peculiar to the plaintiffs.

Id. 101 F.R.D. at 534 (citations omitted). The named representatives allege that they were exposed to hazardous substances released by defendants and their claim does focus on defendant's conduct. Their claim is typical of the claims that would be raised by the absent class members on the issue of liability.

The final requirement of Rule 23(a) is that the representative parties fairly and adequately protect the interests of the class. Defendants emphasize that each named representative admittedly displayed no knowledge of the duties of a class representative, or that they would be required to pay the costs of litigation. While defendants' argument is persuasive, it is the standard argument of defendants in class certification actions and is generally found to be meritless. "[I]t [is] unrealistic to expect the named plaintiffs in a class action to have significant personal knowledge and understanding of the complicated facts, allegations and proofs typical of class actions." *Kuhn v. Skyline Corp.*, C.A. No. 83-0942, slip opinion at 5 (M.D. Pa. Aug. 3, 1984). Defendants have not shown that the interests of the representatives conflict with the interests

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3. Defendants concede that the claims of the proposed representative of the "adjacent residents" subclass will be typical of the claims of the absent members of this subclass to the extent that these claims allege only property damage.

of the class members or that there is antagonism between such interests. *Caruso, supra,* 101 F.R.D. at 534.

IV. *Rule 23(b)*

Although plaintiffs appear able to meet their burden under Rule 23(a), they must additionally demonstrate that each subclass sought to be certified satisfies *one* of the three subcategories of Rule 23(b). It is under this Rule that plaintiff's motion must fail. Plaintiffs seek certification under either Rule 23(b)(1), 23(b)(2), or 23(b)(3).

We find that certification of a Rule 23(b)(1) class is improper because there is no risk of "inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class." Counts I and II of the complaint request an injunction under the citizen suit provisions of CERCLA, 42 U.S.C. §9659, and HSCA, 35 P.S. §6020.1115, directing defendants to comply with the cleanup standards and requirements of those statutes. If this case should warrant the issuance of such an injunction, certainly a denial of class certification poses no risk of varying or inconsistent adjudications. Any future lawsuit initiated by a potential class member could arguably be barred by collateral estoppel, or at most result in adjudications which merely modify prior orders. There is no possibility that the claims of earlier litigants would exhaust defendants' assets.

The difficulty arises when we consider whether class certification is necessary for injunctive relief. Rule 23(b)(2) requires that the district court find the following:

> the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

On its face, plaintiffs request for injunctive relief appears to satisfy Rule 23(b)(2). However, it is the court's belief that a class action is not appropriate for enforcing applicable CERCLA and HSCA provisions. The purpose of citizen suits under CERCLA and HSCA is to determine governmental compliance with federal and state cleanup standards at a particular location. We agree with defendants that the relief sought in the complaint deals with defendants' action at the relevant site, but does not concern the granting of relief to particular individuals. *See* CERCLA, 42 U.S.C. §9659(c), §110(c); HSCA, 35 P.S. §6020.1115(a); *see also Kuhn, supra* (certification of a medical monitoring class denied). Such relief, therefore, can be accomplished by an injunction favoring the named plaintiffs, and if granted would satisfy the interests of the proposed class.

Concerning plaintiffs' request to establish a medical monitoring fund, we are not convinced that certification of a class is needed to assist in the evaluation of the size and scope of the fund. First, the fund may be increased as individual plaintiffs pursue their claims. Moreover, a general monitoring fund cannot realistically be made available via an injunction. Each person seeking access to the fund must show he was exposed to a substantial risk of harm. A claim for a monitoring fund must be pursued as a damage claim, and not thrown in as an add on to a request for broad-based injunctive relief. *See Brown, infra,* slip. op. at 13 (class certification denied for medical monitoring because "any entitlement to this type of relief will depend upon individualized questions of causation and personal medical history").[4]

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4. Plaintiffs "need not exhibit symptoms of a disease before medical surveillance is sought," but "must prove: (1) exposure to hazardous substances, (2) potential for injury; and (3) the need for early detection and treatment" *Merry v. Westinghouse Elec. Corp.*, 684 F.Supp. 847, 849-50 (M.D. Pa. 1988); each element clearly demonstrates a need for individualized inquiry.

Thus, we find that class certification under Rule 23(b)(2) is unnecessary. *See Hudson v. Sullivan*, 717 F.Supp. 340, 343 (W.D. Pa. 1989) (certification under Rule 23(b)(2) held unnecessary as the judgment "will operate as a judgment with regard to the proposed class"); *Simpson v. Heckler*, 630 F.Supp. 736, 741 (E.D. Pa. 1986) (court denied certification under Rule 23(b)(2) because injunctive and declaratory relief sought would "have the purpose and effect of a class action").

We acknowledge that courts have differed over whether the lack of need for a class action, by itself, justifies the denial of class certification under Rule 23(b)(2). *See Finberg v. Sullivan*, 634 F.2d 50 (3d Cir. 1980); *Geraghty v. United States Parole Comm'n*, 579 F.2d 238 (3d Cir. 1978), *vacated on other grounds* 455 U.S. 388 (1980); *on remand*, 552 F.Supp. 276 (M.D. Pa. 1982), *aff'd*, 719 F.2d 1199 (3d Cir. 1983). 1 Newberg on Class Actions §4.19 (2d ed. 1977). These courts have held that certification may not be denied solely on the lack of need, provided that the requirements of Rule 23 are otherwise met. However, plaintiffs in the present case concede that certification of the "soccer players subclass" may not be necessary if an injunction could be otherwise granted. Thus, the broad class remaining is the proposed "FTCA subclass" which relies on tort theories of liability. Therefore, plaintiff must satisfy Rule 23(b)(3) with respect to this FTCA subclass to prevail on the motion for class certification.

Pursuant to Rule 23(b)(3), a matter cannot proceed as a class action unless "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, *and* that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." (emphasis added). We find that the common issues in this matter do not predominate over the questions affecting individual members of the proposed FTCA class.

The extent, if any, of each plaintiff's exposure to toxins will require considerable scientific evidence and must be established on an individual basis. We acknowledge that the necessity to compute damages individually does not automatically preclude certification. However, before damages may be addressed, plaintiffs must prevail on the issue of liability, which cannot be determined without individual inquiries concerning causation and existence of injury. We applied this premise in *Caruso* as follows:

> The problem is that the missing link, causation, will have to be proved in the case of each plaintiff before other individual issues such as damages can be reached.

Id. 101 F.R.D. at 537.

The present action is analogous to *Caruso* and *Kuhn, supra,* and *Brown v. South Eastern Pennsylvania Transportation Authority,* C.A. Nos. 86-2229, 86-4037, 86-5886 (E.D. Pa. April 9, 1987). In *Brown,* the court denied the plaintiff's motion for class certification under Rule 23(b)(3) for personal injury, property damage, and medical monitoring in connection with polychlorinated biphenyl ("PCB") contamination at a railroad site.

The court stated:

> In this action, no amount of judicial innovation can overcome the imperfect fit between Rule 23 and the facts of this case, which involve the effect of PCB contamination on a diverse group at varying degrees over a ten-year period. Except in unique factual settings, courts should hesitate before attempting to 'shoehorn mass-tort cases into Rule 23 requirements.'

slip op. at 2 (citations omitted). With regard to property damage claims the court further said:

> [T]he presence of PCBs on a property does not establish injury for all members of the class. Each plaintiff's property will be damaged to a different degree, if at all, based on it [sic] proximity to the site, topography, and the off-site migration patterns of PCBs. Thus, individual litigants will have to establish injury and causation in order to succeed on the merits.

Id. at 12. Similarly, Judge Rambo in *Kuhn, supra,* stated that determining plaintiffs' exposure to toxins would require "an in-depth personal and individual study of the patient." She added:

> It would be necessary to investigate exposure factors, personal health history and habits and numerous other possible causal factors in order to establish whether formaldehyde did or did not play a part in any cancer detected by the testing ... In light of these facts, it is not difficult to see the difficulties in and impracticability of certifying such a class and organizing such a testing and monitoring procedure.

Kuhn, slip op. at 11.

In *Caruso* we stated:

> Examples of individual questions that we find not readily susceptible of common treatment are varying property damages, varying levels of formaldehyde, ... nature of exposure, time the injury was discovered, and the existence of superseding and intervening causes.

Id. 101 F.R.D. at 535, 537.

Due to the variance in alleged exposures among the plaintiffs, this case will require an inquiry into each class member's activities at and in proximity to Marsh Run Park. Since plaintiffs must prevail on both the 'predominance' and 'superiority' elements of Rule 23(b)(3), and have failed on the

former, we need not discuss the matter further, except to note that a class action is not the better method of adjudication in this matter. *See Boring v. Medusa Portland Cement Co.*, 63 F.R.D. 78, 84 (M.D. Pa. 1974), *appeal dism'd*, 505 F.2d 729 (3d Cir. 1974). Our continuing involvement in this action will permit us to reexamine class certification if circumstances arise that warrant doing so.

V. *Conclusion*

We will issue an appropriate order denying certification of this matter as a class action.

/s/William W. Caldwell
United States District Judge

Date: March 4, 1991

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 1:CV-90-1072

REDLAND SOCCER CLUB, INC., DEAN G. NEWHOUSE, RICHARD V. SPONG, SR., ROBERT E. KANE, and JACK H. HERSHBERGER,

Plaintiffs

vs.

DEPARTMENT OF THE ARMY OF THE UNITED STATES OF AMERICA, and THE UNITED STATES OF AMERICA,

Defendants

MEMORANDUM

We are considering plaintiff's motion to compel discovery.

The first matter to be addressed is the applicability of the Privacy Act to the discovery requests made in this proceeding. It is agreed by defendants that they must disclose information sought in discovery but they argue that under the Act they may do so only "pursuant to the order of a court of competent jurisdiction" 5 U.S.C. §552a(b)(11). Plaintiffs take the position that discovery requests themselves are the equivalent of an "order of court" for the purposes of the Act. The defendants do not agree, however, that a request for discovery or a response thereto, although made in accordance with federal procedural rules, constitutes an order of court. We need not belabor this impasse, and believe defendants' initial reluctance to respond to plaintiffs' requests without a specific order of court is a reasonable precaution in light of the terms of the Privacy Act. We will order that defendants respond to all properly framed discovery requests in this proceeding and

such responses shall hereafter be deemed made pursuant to an order of court.

The following are the court's rulings on the defendants' objections to plaintiffs' discovery requests.

Interrogatory No. 1—Objection sustained. This question is overbroad and burdensome.

Production Request No. 1—Objection sustained. Defendants need not provide copies of plaintiffs' claims.

Production Request No. 2—Objection sustained. This request is overbroad, burdensome and may involve matters protected by the attorney work-product defense.

Production Request No. 3—Objection sustained. This request is overbroad, burdensome and may involve matters protected by the attorney work-product defense.

Production Request No. 4—Objection sustained. This request is overbroad, burdensome and may involve matters protected by the attorney work-product defense.

Production Request No. 5—Objection sustained. This question is overbroad and unduly burdensome.

Production Request No. 6—Objection sustained. This question is overbroad and unduly burdensome.

/s/William W. Caldwell
United States District Judge

Date: January 14, 1991

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 1:CV-90-1072

REDLAND SOCCER CLUB, INC., DEAN G. NEWHOUSE, RICHARD V. SPONG, SR., ROBERT E. KANE, and JACK H. HERSHBERGER,

Plaintiffs

vs.

DEPARTMENT OF THE ARMY OF THE UNITED STATES OF AMERICA, and THE UNITED STATES OF AMERICA,

Defendants

ORDER

AND NOW, this 14th day of January, 1991, it is ORDERED as follows:

1) Plaintiffs' motion to compel discovery is denied.

2) Responses by defendants to discovery requests of plaintiffs during the course of this litigation shall be deemed to be made pursuant to an order of court, in compliance with 5 U.S.C. §555a(b)(11).

3) All future discovery disputes will be resolved by conference with the court and no further discovery motions shall be filed. The court shall be notified as appropriate.

4) Counsel are strongly encouraged to amicably resolve future discovery disputes. Requests for discovery should be focused and narrowed as much as possible, given the subjects to be resolved during the course of this litigation.

/s/William W. Caldwell
United States District Judge

Supreme Court, U.S.
FILED
JAN 11 1996
CLERK

No. 95-588

In the Supreme Court of the United States

October Term, 1995

REDLAND SOCCER CLUB, INC. et al.,

Petitioners

vs.

DEPARTMENT OF THE ARMY OF THE UNITED STATES OF AMERICA
and
THE UNITED STATES OF AMERICA,

Respondents

REPLY BRIEF TO BRIEF IN OPPOSITION

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ARGUMENT

1. Despite Respondents' arguments to the contrary, the fact is that the Court of Appeals for the Third Circuit has held in this case that medical monitoring cannot be awarded unless it is shown that medical *tests* (not a special *regimen)* are necessary. The record shows that Petitioners' medical expert specifically recommended a special medical monitoring regimen, even though special tests were not recommended. Petitioners not only raised that point but supported it with citations to the record in their Petition for Rehearing to the Third Circuit, as follows:

> 10. The critical factual error is that Dr. Daum did, in fact, recommend a medical monitoring regimen that differed from the regimen normally recommended, even though she noted that the examinations she suggested are recommended for all adults, as this Court noted. *Slip Opinion* at 37-38.
>
> 11. Jessica Herzstein, M.D., M.P.H., Defendants' medical expert, gave testimony that not only shows that Dr. Daum had recommended a regimen different from the one normally recommended but also shows that Defendants had never raised that issue, since Dr. Herzstein criticized Dr. Daum for recommending tests that are not normally recommended by the American Cancer Society. 92a and *see* 79a-87a and 88a-95a.
>
> 12. Dr. Daum also recommended that specific medical tests be done commencing at an earlier age and occurring at a greater frequency than that recommended for the general population. 3012-3013a.

> 13. Thus, the fact that the examinations (*i.e.*, the precise medical tests) recommended by Dr. Daum did not differ from examinations recommended for the general population did not mean that the medical monitoring regimen recommended by Dr. Daum was not different.

See attached Supplemental Appendix (hereinafter "Pet. S. App.") at 4b. Any implication in Respondents' Brief in Opposition (hereinafter "Opp. Brief") that the record fails to show that a special monitoring regimen was not recommended is, therefore, clearly erroneous.[1]

As noted in the instant Petition, the Third Circuit repeatedly emphasized the *type* of testing that was recommended, not the regimen. *See* Pet. at 16, Pet. App. at 43a-44a and 58a, and 55 F.3d at 841 and 848. Thus, neither the precise nature of the Third Circuit's holding nor the importance of that holding has been brought into serious question by Respondents.

The importance to the federal government of the Third Circuit's requirement for special medical tests has not been challenged. Respondents have not and cannot genuinely dispute the enormity of the toxic waste problems facing the United States' military, nor can they dispute that the military services have been the greatest single source of the toxic waste problems confronting this Country. *See* Pet. at 11. Thus, Respondents do not argue that the question of what standards will be utilized by federal courts to determine when the military must pay for medical monitoring of individuals who

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[1] While Respondents' Brief never expressly asserts that the medical monitoring regimen recommended by Petitioners' expert was not special, it does assert that Petitioners failed to direct this Court's attention to a specific portion of the record. Opp. Brief at 12. Since there is no genuine dispute as to what the record shows, particularly in light of the fact that Respondents' own expert criticized Petitioners' expert for recommending a special regimen, such an assertion elides the question.

were exposed to toxic substances as a result of legally wrongful military action is unimportant to the federal government.[2] Rather, they argue only that that question is a matter of state law.

Even if the question of whether the Third Circuit erred in creating a standard requiring a need for special medical testing is viewed as one of state common law, this Court is not powerless to review a circuit court decision that erroneously predicts what a particular state's courts would do. That is particularly true where the court of appeals has created a new legal requirement that is not only wholly lacking in precedential support but is also fundamentally flawed.[3] It is even more true when such a flawed holding has resulted, at least in part, from the circuit court's failure to afford an opportunity to a party to address the question, an issue discussed below.

The fact that this Court must be selective in determining when to grant certiorari is indisputable. Nevertheless, even cases which at first sight might be viewed as raising questions that do not normally justify the allocation of this Court's time do occasionally raise issues that justify this Court's attention. In the instant case, the question of the standard applicable to medical monitoring may be extremely important to the federal government. Of greater importance in this case, perhaps, is a consideration of this Court's critical role in supervising lower courts. If opinions of courts of appeal are not reviewed any

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[2] It could be argued that the question involved is of such great importance to the federal government that this is an area involving "uniquely federal interests" which would justify the application of federal common law under the analysis of *Boyle v. United Technologies Corp.* 487 U.S. 500, 504-505 (1988). However, it is not necessary to reach that question in order to determine whether the instant Petition should be granted.

[3] Respondents have not even attempted to argue that the decision of the Utah Supreme Court in *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970 (1993) supports a holding requiring special medical tests. Rather, they suggest that the Third Circuit's holding merely requires a special regimen, even though that is clearly not the case, as discussed above.

time a case involves an issue of state common law—even when that issue is of importance to the federal government, when the appeals court has created an unprecedented and erroneous standard, and when the court has failed to afford the parties an opportunity to address the issue—the federal judicial system is harmed.

2. Respondents' attempt to suggest that Petitioners did have an opportunity to address the issue of whether they were required to and did show that they needed either special medical tests or a special regimen is completely predicated upon their assertion that the Third Circuit merely followed its earlier holding in *In Re Paoli Railroad Yard Litigation*, 35 F.3d 717 (1994) *(Paoli, II)*. *See* Opp. Brief at 6-10, and 12-14. That assertion is fallacious, however.

Paoli II did not hold that special medical *tests* must be recommended for medical monitoring to be awarded, which was the actual holding of the Third Circuit in this case. There is even some doubt that that decision should be viewed as clearly holding that a special regimen must be recommended. The language cited by Respondents as that holding constituted one-half page out of an eighty-two page opinion. 35 F.3d at 788. It is not clear that that language, which discusses the standard adopted by the Utah court in *Hansen, supra*, was analytically necessary to the Court's ultimate judgment reversing the summary judgment that had been entered by the district court. Furthermore, although the decision first suggests that a special monitoring regimen must be necessitated, it then notes that it need only be shown that the exposure to toxic substances was a significant contributing factor in creating a need for medical monitoring. *Id.* at 788 (n.53).

Thus, Respondents' suggestion that Petitioners should have requested an opportunity to be heard on the issue of the application of *Paoli II* after oral argument had been conducted

by the Third Circuit is illogical. Even if that opinion is viewed as unequivocally requiring that a special medical monitoring regimen is necessary, Petitioners would not have needed to address that issue, since the record clearly showed that a special regimen had been recommended. The heart of the *Paoli II* opinion, which consists of a discussion of the reliability and admissibility of expert testimony, only buttressed arguments that had already been advanced by Petitioners. Furthermore, Respondents' suggestion evades the true question.

The fact is that Petitioners were never afforded an opportunity to address the question of whether special medical tests or a special regimen was required. Respondents never raised the argument that Petitioners had failed to meet such a burden. In fact, the obverse is true; Respondents' expert attacked the opinion of Petitioners' expert precisely on the basis that the regimen recommended was different from the regimen usually recommended. Pet. S. App. at 3b-4b (¶11). Yet, as Respondents specifically note, the Third Circuit decided this case against Petitioners on the basis that they had not introduced evidence on an issue that had never been raised. Opp. Brief at 10-11 (n.6).

Petitioners specifically raised the argument that they had never been afforded an opportunity to address the issue in their Petition for Rehearing to the Third Circuit. Pet. S. App. at 2b-3b (¶¶1-8). Respondents did not then argue that the issue had been raised at any earlier point or that Petitioners had been afforded an actual opportunity to address it, and they have not argued that now. Petitioners' argument that legal issues can be decided on appeal in some instances without affording the parties an opportunity to address it is inapposite. The issue of whether the summary judgment entered against Petitioners should have been affirmed on the basis that they had failed to show that the needed special medical tests was not a purely legal one but involved questions of fact as well.

Argument

This Court's opinions in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), efficaciously strengthened the procedural device of motions for summary judgment, thereby facilitating earlier and more efficient resolution of cases. However, when that procedural devise is utilized to resolve a case against a party on the basis of an issue that was never raised by the opposing party's motion and that the losing party was never otherwise given an opportunity to address, that device does not provide due process or fundamental fairness. It becomes an ambush.

3. Respondents' citation to precedential authority to support the proposition that a *Touhy* regulation may properly be utilized to prohibit governmental employees from disclosing official information or documents that have been acquired as a result of the performance of official duties is, once again, accurate but inapposite. It begs the question by assuming that the eyewitness testimony that had been sought by Petitioners from *former* employees constituted "official information." Respondents compound this error by also suggesting that Petitioners had failed to inform Respondents about the precise nature of the information sought. Opp. Brief at 15. To the contrary, Respondents only learned about the existence of those former employees as potential witnesses when Petitioners listed them and indicated that they would testify as to their "... eyewitness observations concerning the routine handling, usage, and disposal of toxic and/or hazardous substances at NCAD during the course of their employments—some eight to nine years earlier." Pet. at 8. In fact, the parties had corresponded in detail concerning this matter. *See* 79a.

The question posed by this issue is not an insignificant one. The courts below have now extended *Touhy* well beyond its literal language and beyond the intention of this Court. If *Touhy* regulations are to be automatically applied to all former government employees regardless of how remote in time their

employment was, if even eyewitness observations are automatically deemed to constitute "official information" and if those automatic conclusions are to be applied even in cases where the government is a party who has been specifically alleged to have engaged in tortious conduct, then *Touhy* invades rights guaranteed by the First and Fifth Amendments of the United States Constitution.[4] *See* Pet. at 26. That question should not be dismissed as insignificant, despite Respondents' assertions. Opp. Brief at 15.

[4] The fact that those assumptions have been automatically made is demonstrated by the fact that the district court ruled upon Petitioners' Motion raising this issue before Petitioners were even afforded an opportunity to submit a brief addressing it and by the fact that the Third Circuit summarily dealt with this issue without addressing any of the questions that had been raised. Pet. S. App. at 8b-9b (¶¶38-39).

CONCLUSION

For the foregoing reasons and the reasons set forth in the instant Petition, this Court should grant certiorari.

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Dated: January 11, 1996

Supplemental Appendix

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 93-7829

REDLAND SOCCER CLUB, INC., et al.,

Appellants

v.

DEPARTMENT OF THE ARMY OF UNITED STATES OF AMERICA, et al.,

Appellees

Appeal from the United States District Court for the
Middle District of Pennsylvania
M.D. No. 1:CV-90-1072
(The Honorable William W. Caldwell)

PETITION FOR REHEARING

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NOW COME Appellants/Plaintiffs (hereinafter "Plaintiffs") to petition this Honorable Court, pursuant to F.R.App.

40, for a rehearing of the above-captioned appeal and state the following in support thereof:

A. *The decision of May 15, 1995, is improperly and erroneously based upon an issue that was neither raised in the District Court nor raised on appeal.*

1. The precise basis of this court's decision affirming the summary judgment entered by the District Court as to all Plaintiffs other than the Elliotts was stated as follows:

> Thus, because all the Redland FTCA Plaintiffs (the Township Workers, the Neighbors and the Soccer Players) failed to introduce evidence that their exposure *required a different medical monitoring regimen than that which would normally be recommended for them absent exposure*, under *Paoli II*, we will affirm the District Court's Order granting summary judgment to the United States on the Redland FTCA Plaintiffs' medical monitoring claims. (emphasis added)

Slip Opinion of May 15, 1995 (hereinafter "Slip Opinion") at 38, a copy of which is attached hereto as Exhibit "A."

2. The issue of whether a necessary element of Plaintiffs' cause of action was to show that their exposure required a different medical monitoring regimen than that normally recommended and whether Plaintiffs had met that burden was never raised by Defendants in the District Court.

3. The District Court did not address the issue of whether Plaintiffs were required to and could show that they needed a different medical monitoring regimen.

4. That issue was not raised by Defendants in this Court, nor was that issue addressed in any of the briefs or raised during oral argument before this Court.

5. It would have been a clear error of law for the District Court to have entered summary judgment against Plaintiffs on

the basis of that aforesaid issue, since Defendants had not raised that issue and, therefore, Plaintiffs had not had an adequate opportunity to address it.

6. Since the issue of whether Plaintiffs had to and could show that they needed a different medical monitoring regimen is a mixed one of both law and fact, this Court erred as a matter of law in raising it *sua sponte* on appeal. *Fountain v. Filson*, 336 U.S. 681, 683, 69 S.Ct. 754, 755-56 (1949) and *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 156, 83 S.Ct. 1210, 1224, (1963).

7. The raising of that issue *sua sponte* after the filing of briefs and the holding of oral argument deprived Plaintiffs of due process by preventing them from being heard on that issue. *Paskaly v. Seale*, 506 F.2d 1209, 1211 (n.4) (9th Cir. 1974).

8. Plaintiffs should not now be required to show how they would have responded to that issue if it had been raised by the United States in the District Court, since Defendants' failure to raise that issue denied Plaintiffs an adequate opportunity to present relevant evidence (such as an Affidavit from Susan M. Daum, M.D.) addressing that issue.

9. Nevertheless, assuming, *arguendo*, that Plaintiffs are required to address that issue in the instant Petition or upon rehearing, Plaintiffs can show that the Court's resolution of that issue is based upon both legal and factual errors.

10. The critical factual error is that Dr. Daum did, in fact, recommend a medical monitoring regimen that differed from the regimen normally recommended, even though she noted that the examinations she suggested are recommended for all adults, as this Court noted. *Slip Opinion* at 37-38.

11. Jessica Herzstein, M.D., M.P.H., Defendants' medical expert, gave testimony that not only shows that Dr. Daum had recommended a regimen different from the one normally

recommended but also shows that Defendants had never raised that issue, since Dr. Herzstein criticized Dr. Daum for recommending tests that are not normally recommended by the American Cancer Society. 92a and *see* 79a-87a and 88a-95a.

12. Dr. Daum also recommended that specific medical tests be done commencing at an earlier age and occurring at a greater frequency than that recommended for the general population. 3012-3013a.

13. Thus, the fact that the examinations (*i.e.*, the precise medical tests) recommended by Dr. Daum did not differ from examinations recommended for the general population did not mean that the medical monitoring regimen recommended by Dr. Daum was not different.

14. If Plaintiffs had been given an opportunity to present evidence on this issue, they would have shown that medical monitoring can usually only consist of well-established, commonly-recommended medical tests or procedures. For example, in cases involving exposure to asbestos, the test generally recommended is a chest x-ray, since chest x-rays are the best and, perhaps, only appropriate test for determining the effects of exposure to asbestos; however, chest x-rays are routinely recommended for the general adult population. Did this Court really intend to hold that medical monitoring could only be ordered for a group that has been exposed to asbestos if a doctor can recommend some test other than a chest x-ray?

15. This Court erred in determining that *Paoli II* and *Hansen v. CCI Mechanical, Inc.*, 858 P.2d 970, 980 (Utah) (1993) held that a "significant exposure" can be shown only where an exposure is sufficient to require a monitoring regimen different from that normally recommended. *See Slip Opinion* at 33-34. In *Hansen, supra,* the court merely reasoned that a plaintiff's medical expert's failure to recommend testing

other than that recommended for the general population constituted evidence that that expert did not really view the exposure as being "significant." *Id.* at 980; *Paoli II* at 788.

16. The instant case would be distinguishable from *Hansen* on the basis that Dr. Daum expressly and unequivocally opined that the Plaintiffs had suffered a "significant exposure," as well as being distinguishable on the basis that Dr. Daum did, in fact, recommend a regimen of testing that is different from that recommended for the general population.

17. In light of the foregoing, the court clearly erred in affirming summary judgment against Plaintiffs on the basis that Plaintiffs had failed to prove that their exposure required a different medical monitoring regimen than that which would normally be recommended, and the instant Petition should, therefore, be granted.

B. *This Court erred in its decision of May 15, 1995, on other issues that were properly raised, briefed, and argued by Plaintiffs.*

18. This Court affirmed the District Court's entry of summary judgment against Plaintiffs' claim for damages for negligent infliction of emotional distress based upon the following finding:

> The record shows that none of the Redland FTCA Plaintiffs currently suffer ... a medically-identifiable effect from any exposure to chemicals at the Park.

Slip Opinion at 38.

19. That finding is factually erroneous, since Plaintiffs' experts unequivocally testified that Plaintiffs had been exposed to and ingested toxic substances and that that exposure resulted in a significant health risk (*i.e.*, a "medically-identifiable effect") to Plaintiffs.

20. If this Court intended to hold that a "physical injury or impact" sufficient to support a claim for emotional distress could not be established by showing an exposure to toxic substances which results in a significant health risk, then that holding constitutes an error of law because it is in conflict with this Court's prior holding in *Paoli I* and other relevant precedents.

21. This Court erred by holding—without any discussion or consideration of arguments properly raised and briefed by Plaintiffs and only in a footnote—the following:

> We believe that the elements of a claim for medical monitoring under CERCLA and HSCA are the same as the elements for a common law, medical monitoring claim set out in *Paoli I* and *Paoli II*.

Slip Opinion at 39 (n.12).

22. Plaintiffs had, in fact, presented a detailed analysis of the statutory provisions, history, and intent of both CERCLA and HSCA and had particularly focused upon the express provisions for medical monitoring and studies in HSCA. *See Brief for Appellants* at 15-21 and *Reply Brief for Appellants* at 10-16.

23. Both HSCA and CERCLA are strict liability statutes.

24. This Court erred as a matter of law in applying a common law tort standard to HSCA and CERCLA.

25. Particularly in light of HSCA's legislative intent and express provisions for medical monitoring and studies, this Court erred in applying a common law tort standard to it.

26. This Court held that the costs incurred by Plaintiffs for the performance of the health risk assessment and obtaining of expert testimony did not constitute recoverable "response costs" under CERCLA on the basis that those costs were "designed" to serve "litigation purposes." *Slip Opinion* at 32.

27. That holding constitutes error, since the intention of a party in incurring costs is altogether irrelevant to a consideration of whether a cost is a recoverable "response cost" under CERCLA; rather, this Court should have addressed the question (which was properly briefed and argued by Plaintiffs) of whether, in the event that Plaintiffs prevail in obtaining medical monitoring medical monitoring [sic] under CERCLA, they would be entitled to recover those costs in light of the fact that obtaining a health risk assessment and Dr. Daum's recommendations concerning a medical monitoring regimen would have been necessary and proper elements of that medical monitoring and, therefore, would be recoverable costs.

28. This court summarily, without discussion, and in a footnote rejected Plaintiffs' argument that the District Court had abused its discretion by denying Plaintiffs' Motion for Emergency Relief. *Slip Opinion* at 10-11 (n.2).

29. That summary rejection of Plaintiffs' argument constitutes error for reasons discussed below.

30. This Court summarily, without discussion, and in a footnote rejected Plaintiffs' argument that the District Court erred in failing to consider whether the United States' commission of illegal acts, status as a tort feasor, and failure to objectively evaluate the deliberative content of documents allegedly privileged should have been considered by the District Court. *Slip Opinion* at 53 (n.22).

31. This Court's summary rejection of those contentions without addressing the arguments briefed to this Court and the precedential authority cited to the District Court constitutes error. *See Brief for Appellants* at 29-33 and *Reply Brief of Appellants* at 19-23.

32. This Court summarily, without discussion, and in a footnote held that Plaintiffs' argument that the District Court

abused its discretion by denying class certification lacked merit. *Slip Opinion* at 10-11 (n.2).

33. That summary holding, which failed to address any of the authority or principles cited by Plaintiffs, constitutes error. *See Brief for Appellants* at 36-39 and *Reply Brief of Appellants* at 23.

C. *This Court's decision of May 15, 1995, erroneously and improperly fails to address issues which were properly raised and briefed by Plaintiffs.*

34. This Court expressly declined to address the issue of whether the Plaintiffs were entitled to injunctive and remedial relief, including attorneys' fees, expert fees, and health risk assessment costs, under HSCA in light of the Court's disposition of Plaintiffs' other claims. *Slip Opinion* at 42 (n.14).

35. In light of the fact that the Court's disposition of this appeal was erroneous for the reasons discussed above, the court's failure to address the issue of whether Plaintiffs are entitled to injunctive and remedial relief under HSCA is error.

36. This Court failed to address the issue, which was properly raised and briefed by Plaintiffs, of whether the District Court erred in denying Plaintiffs' Motion for Partial Summary Judgment, apparently in light of this Court's disposition of this appeal. *See Brief for Appellants* at 21-27 and *Reply Brief of Appellants* at 16-19.

37. In light of the fact that this Court's disposition of this appeal constitutes error for the reasons discussed above, the Court's failure to address the issue of whether the district court erred in failing to grant partial summary judgment to Plaintiffs also constitutes error.

38. As noted above, this Court summarily rejected Plaintiffs' argument that the District Court abused its discretion in denying Plaintiffs' Motion for Emergency Relief without ad-

dressing any of the arguments that had been raised and briefed by Plaintiffs.

39. Plaintiffs had raised and briefed the following arguments that the District Court abused its discretion in denying Plaintiffs' Motion for Emergency Relief:

> a. That eyewitness observations concerning the use, handling, and disposition of toxic and hazardous substances by Army employees eight or nine years earlier did not constitute "official information" under the Army's *Touhy* regulation;
>
> b. That a *Touhy* regulation cannot be invoked to preclude a private litigant from obtaining relevant and probative eyewitness testimony on an issue material to litigation in which the government has been accused of wrongful conduct;
>
> c. That the application of the Army's *Touhy* regulation in the context of this case violated Plaintiffs' First and Fifth Amendment rights; and
>
> d. That the Court below erred in failing to afford Plaintiffs an opportunity to brief or otherwise submit supporting argument for their Motion for Emergency Relief.

See Brief for Appellants at 27-29 and *Reply Brief of Appellants* at 19.

40. The Court's failure to address each of the arguments set forth above constitutes error.

41. This Court also rejected Plaintiffs' argument that the District Court abused its discretion in its Order of January 29, 1993, by denying Plaintiffs' Motion to Compel discovery of five documents on the basis that the District Court did not err in rejecting Plaintiffs' waiver argument. *Slip Opinion* at 53-54.

42. In addition to the waiver argument Plaintiffs properly raised and briefed the following arguments to support their assertion that the Order of January 29, 1993, constituted an abuse of discretion:

a. That the District Court not only held that the five documents were privileged but also improperly and erroneously suppressed all factual information contained in those documents;

b. That the District Court improperly applied a "compelling reasons" standard, rather than a balancing test in determining whether the five documents were privileged;

c. That, in light of the probative importance of those five documents, proper application of a balancing test mandates that those five documents not be deemed privileged for purposes of this litigation; and

d. That those five documents were not, in fact, subject to the Deliberative Process Privilege.

See Brief for Appellants at 29a-33a and *Reply Brief of Appellants* at 19a-23a.

WHEREFORE, Appellants (Plaintiffs below) respectfully request that this Honorable Court grant them a rehearing of this appeal, pursuant to Fed.R.App. 40.

Respectfully submitted,
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Dated: June 6, 1995

CERTIFICATE OF SERVICE

I, Laurence W. Dague, Esquire, of the law firm of Shumaker Williams, P.C., hereby certify that I served a true and correct copy of the foregoing Petition for Rehearing on this date by depositing a copy of the same in the possession of the United States mail, first-class, postage prepaid, addressed as follows:

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PROOF OF SERVICE

I, Laurence W. Dague, Esquire, of the law firm of Shumaker Williams, P.C., hereby certify that on this date a true and correct copy of the foregoing Petitioners' Reply Brief was served on the following persons:

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Dated: January 11, 1996

Supreme Court, U. S.
FILED
DEC 13 1995
CLERK

No. 95-588

In the Supreme Court of the United States

OCTOBER TERM, 1995

REDLAND SOCCER CLUB, INC., ET AL., PETITIONERS

v.

DEPARTMENT OF THE ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that, under Pennsylvania law, a victim of a toxic tort who has made a claim seeking damages for future medical monitoring must establish a need for medical examinations beyond those normally recommended for the general population.

2. Whether the court of appeals correctly affirmed the dismissal of petitioners' medical monitoring claims on the basis of a decision issued while the appeal in this case was pending.

3. Whether the court of appeals correctly held that the district court acted within the scope of its discretion:

(a) when it held that the United States did not waive the "deliberative process privilege" by inadvertently producing five documents; and

(b) when it denied petitioners' motion for class certification.

4. Whether the court of appeals correctly held that petitioners were required to comply with an Army regulation patterned on the regulation upheld in *United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462 (1951).

5. Whether the court correctly held that, under Pennsylvania law, petitioners could not recover for negligent infliction of emotional distress, because they had failed to allege that they had suffered a physical injury.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-588

REDLAND SOCCER CLUB, INC., ET AL., PETITIONERS

v.

DEPARTMENT OF THE ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 16a-77a) is reported at 55 F.3d 827. Two opinions of the district court (Pet. App. 82a-104a, 114a-124a) are reported at 835 F. Supp. 803 and 801 F. Supp. 1432, respectively. The other orders and opinions of the district court (Pet. App. 78a, 79a-81a, 105a-109a, 110a-113a, 125a-126a, 127a-141a, 142a-153a, 154a-160a, 161a-171a, 172a-174a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 15a) was entered on May 15, 1995. A petition for rehearing was denied on July 13, 1995. Pet. App. 14a. The petition for writ of certiorari was filed on October 10, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The United States Army operates the New Cumberland Army Depot (NCAD), a large supply facility in Fairview Township, Pennsylvania. Pet. App. 82a.[1] For about 40 years, beginning in 1917, the NCAD disposed of various forms of waste in an adjacent 14-acre landfill, known as, Marsh Run Field that was owned by the United States. *Id.* at 82a-83a. In 1976, the United States transferred Marsh Run Field to the township by quitclaim deed. *Id.* at 83a. In 1981, the township began excavating and leveling the site for use as a soccer field. Pet. App. 30a. The Township completed the field in 1982, and petitioner Redland Soccer Club used the field from 1982 until the field was closed in 1987. *Ibid.*

In 1990, petitioners filed this action in United States District Court for the Middle District of Pennsylvania. Petitioners fall into one of three groups: (1) children and adults who used the field for soccer activities; (2) Fairview Township employees who worked at the field; and (3) residents living near the field who used the field. Pet. App. 27a. Petitioners alleged that the United States had negligently disposed of hazardous waste at the landfill and had

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[1] NCAD is now known as Defense Distribution Region East. Pet. App. 82a.

negligently failed to inform the township of the hazardous condition of the land. Petitioners claimed that, as a result of their alleged exposure to hazardous chemicals at Marsh Run Field, they suffered an increased risk of cancer and other diseases. *Id.* at 39a-44a. Petitioners sought monetary damages for medical monitoring and emotional distress under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671-2680. Pet. App 48a.[2] The district court consolidated discovery proceedings in this case with discovery proceedings in *O'Neal* v. *Department of the Army*, 852 F. Supp. 327 (M.D. Pa. 1994), in which residents who lived near the NCAD claimed that their well water had been contaminated by toxic chemicals from the depot. Pet. App. 105a, 110a.[3]

2. Several distinct district court rulings are germane to this petition.

a. The district court denied petitioners' request for class certification. Pet. App. 154a-171a. The court

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[2] Petitioners also sought monetary and injunctive relief under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601 *et seq.*, and the Pennsylvania Hazardous Sites Cleanup Act (HSCA), 35 Pa. Const. Stat. §§ 6020.101 *et seq.* (1993). Pet. App. 48a. The district court dismissed petitioners' claims under CERCLA and HSCA. Pet. App. 114a-122a, 142a-147a. The court of appeals affirmed the dismissal of petitioners' CERCLA claims and found it unnecessary to address their HSCA claims. Pet App. 60a-63a & n.14. Petitioners have not sought review of those rulings.

[3] In a separate action, several petitioners, who are members of one family (the Elliott family) and who claim to have played soccer at or otherwise used Marsh Field for recreational activity, sought damages for alleged exposure to contaminants emanating from the field. See *Elliott* v. *United States*, No. 1:CV-91-0289 (M.D. Pa). Pet. App. 39a.

also denied petitioners' motion to compel production of documents that the United States had withheld pursuant to the deliberative process privilege, including five documents that the United States inadvertently produced to petitioners. *Id.* at 110a-113a.

b. In January, 1993, the United States moved for summary judgment on petitioners' claims for damages under the FTCA for medical monitoring and emotional distress. On October 19, 1993, the district court entered judgment against petitioners on those claims. Pet. App. 91a-99a. The court noted that the Third Circuit had concluded that, if confronted with the issue, the Pennsylvania Supreme Court would recognize a cause of action under state tort law for medical monitoring. *Id.* at 91a (citing *In re Paoli R.R. Yard PCB Litigation*, 916 F.2d 829, 851 (3d Cir. 1990) (*Paoli I*), cert. denied, 499 U.S. 961 (1991)). However, the district court also noted that, under *Paoli I*, to make out such a claim, a plaintiff must establish: (1) that the plaintiff was "significantly exposed" to a proven hazardous substance; (2) that as a proximate result, the plaintiff suffered a significantly increased risk of contracting a serious latent disease; (3) that the increased risk made periodic diagnostic examinations reasonably necessary; and (4) that monitoring procedures existed that made early detection possible and beneficial. *Paoli I*, 916 F.2d at 852. The district court held that petitioners failed to satisfy the first element of the test because they could not adduce facts to demonstrate that they had been exposed to hazardous substances at the surface of the field. Pet. App. 92a-98a. The district court dismissed petitioners' claims for emotional distress because no petitioner had suffered a physical

injury, which under Pennsylvania law is a prerequisite for recovery of such damages. *Id.* at 99a.

c. On November 16, 1993, after the grant of summary judgment for the United States on petitioners' claims, the district court entered an additional discovery order. Pet. App. 79a-81a. The order held that, under an Army regulation, 32 C.F.R. 516.35(d) (the *Touhy* regulation), petitioners' attorneys were forbidden from contacting any current or former NCAD employees to obtain "official information"[4] without first setting forth in writing the nature and relevance of the information sought and seeking the Army's consent to such contact. Pet. App. 80a-81a.[5] The district court declined to rule on petitioners' challenge to the constitutionality of that regulation, noting that, if upon notification the Army were to consent to direct contact between petitioners' attorneys and its employees, a constitutional determination would be unnecessary. *Id.* at 81a. The court noted that the Army had represented that "it does not seek to hamper discovery," but instead to insure compliance with its regulations and to insure "that contacted employees have the opportunity to have Army counsel present with them at any session with Plaintiffs' counsel." *Ibid.*

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[4] Official information is information "acquired by Department [of Defense] personnel as part of their official duties or because of their official status within the Department while such personnel were employed by or on behalf of the Department." 32 C.F.R. Pt. 516 & App. M.

[5] Such regulations, which are common to federal agencies, are known as "*Touhy* regulations" based on this Court's decision in *United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462 (1951), which upheld a similar regulation governing employees of the Department of Justice.

3. The court of appeals affirmed. Pet. App. 16a-77a. In affirming the dismissal of the medical monitoring claims, the court of appeals held that, although petitioners had produced sufficient evidence to indicate that they might have actually been exposed to hazardous substances at the field, they had not produced sufficient evidence to create a material issue of fact on the question whether such exposure was "significant" under *Paoli I*. Pet. App. 55a-58a.

The court of appeals relied on its decision in *In re Paoli Railroad Yard Litigation*, 35 F.3d 717 (3d Cir. 1994) (*Paoli II*), cert. denied, 115 S. Ct. 1253 (1995), which was handed down two months after oral argument in this case. In *Paoli II*, the court of appeals held that a "significant exposure" is an exposure that necessitates "a monitoring regime different than the one that would have been prescribed in the absence of that particular exposure." 35 F.3d at 788, quoting *Hansen* v. *Mountain Fuel Supply Co.*, 858 P.2d 970, 980 (Utah 1993). *Paoli II* concluded that the Pennsylvania Supreme Court would hold, as had the Utah Supreme Court in *Hansen*, that a plaintiff may recover damages based on a medical monitoring claim "only if the defendant's wrongful acts increased the plaintiff's incremental risk of incurring the harm produced by the toxic substance enough to warrant a change in the medical monitoring that otherwise would have been prescribed for that plaintiff." 35 F.3d at 788, quoting *Hansen*, 858 P.2d at 980. The court of appeals held that, under *Paoli II*, petitioners "failed to introduce evidence that their exposure required a different medical monitoring regimen than that which would normally be recommended for them absent exposure." Pet. App. 58a. The court noted that petitioners' own medical monitoring expert, Dr.

Susan Daum, in recommending a medical monitoring protocol for petitioners, had stated: "I emphasize * * * that the examinations suggested [below] are not out of the ordinary, but consist of the usual adult medical examinations recommended for all adults with the adult risk of cancer in our society. *Ibid.*

In affirming the dismissal of the emotional distress claims, the court of appeals agreed with the district court that no evidence had been presented that any petitioner suffered from a physical injury or medically-identifiable effect from exposure to chemicals at the field. Pet. App. 59a. In cases of negligent infliction of emotional distress in which there is no physical injury, the court of appeals noted, Pennsylvania law does not provide for recovery. *Ibid.* (citing cases).

The court of appeals also summarily rejected petitioners' claims that the district court abused its discretion in denying petitioners' request for class certification, and that the district court had erred in requiring compliance with the Army's *Touhy* regulation. Pet. App. 28a n.2. Finally, the court of appeals held that the district court correctly rejected the claim that the government had waived the deliberative process privilege by inadvertently producing five documents to petitioners' counsel. *Id.* at 75a-76a; *id.* at 29a-30a n.3.

ARGUMENT

1. Petitioners' principal argument (Pet. 11-19) is that the court of appeals erred in requiring that, in a tort action for damages for medical monitoring, a plaintiff must establish that his exposure to toxic materials has necessitated "a monitoring regime different than the one that would have been prescribed

in the absence of that particular exposure." Pet. App. 53a, quoting *Paoli II*, 35 F.3d at 788. In applying that standard, the court of appeals was construing Pennsylvania tort law; it did not address any federal statutory or constitutional issue. See Sup. Ct. R. 10; *Wolf* v. *Weinstein*, 372 U.S. 633, 636 (1963) (dismissing writ of certiorari as improvidently granted where legal question "primarily implicates questions of Pennsylvania law and presents no federal question of substance"). Petitioners' suggestion that this Court should intervene to "establish coherent and practical standards to govern toxic tort cases" (Pet. 11) is at odds with the settled principle that, in the absence of a governing federal statute, it is for state statutory and common law, not this Court, to develop standards of tort law. See *Erie R.R.* v. *Tompkins*, 304 U.S. 64, 78 (1938) ("[t]here is no federal general common law").

In its decisions in *Paoli I*, *Paoli II* and this case, the Third Circuit made clear that, in announcing the elements of a cause of action for medical monitoring damages, it was applying state law. When the medical monitoring issue first arose in *Paoli I*, the Third Circuit stated:

> Neither the Pennsylvania Supreme Court nor the Pennsylvania Superior Court has decided whether a demonstrated need for medical monitoring creates a valid cause of action. Therefore sitting in diversity, we must predict whether the Pennsylvania Supreme Court would recognize a claim for medical monitoring under the substantive law of Pennsylvania and, if so, what its elements are.

916 F.2d at 849 (footnote omitted), citing *Erie*. In *Paoli II*, the Third Circuit likewise predicted that "the Pennsylvania Supreme Court would set some limits on medical monitoring claims," and accordingly adopted the "special medical monitoring" standard to gauge whether a plaintiff's exposure to a toxic substance was "significant." 35 F.3d at 788. In its decision in this case, the Third Circuit reiterated that it was applying state law, and, in particular, noted that it was predicting how the Pennsylvania Supreme Court would construe the elements of a medical monitoring cause of action. See Pet. App. 52a-53a. In looking to state law in these cases, the Third Circuit acted consistently with the FTCA, which provides that, where a claim is based on the FTCA, the court must determine liability "in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b).

Even if it were appropriate for this Court to review the correctness of the court of appeals' prediction of how the Pennsylvania Supreme Court would construe the elements of a medical monitoring cause of action, the court of appeals' explication of the "significant exposure" standard was reasonable. As the court of appeals noted, requiring a plaintiff to establish that his exposure to a toxic substance required him to obtain additional medical monitoring merely requires the plaintiff, in the context of the medical monitoring claim, to satisfy the traditional common law requirement that a tort have caused injury. The court of appeals explained:

> The injury requirement is particularly important before a remedy such as medical monitoring is provided because the plaintiff's injury is only an

> increased possibility of harm rather than actual harm. *Paoli II*'s requirement of "special" medical monitoring implicitly recognizes the longstanding requirement in all tort cases other than those based on the old "intentional" common law torts for various forms of trespass that a plaintiff must prove an injury before he may recover anything from a defendant * * * Otherwise, a polluter would become a health care insurer for medical procedures routinely needed to guard persons against some of the ordinary vicissitudes of life. It would convert toxic torts into a form of specialized health insurance. * * *

Pet. App. 55a n.8 (citations omitted). In criticizing the court of appeals for failing to "consider the financial ability of the victims to pay for medical testing" that would be appropriate even absent exposure to toxic substances (Pet. 18), petitioners are effectively seeking "a form of specialized health insurance." Pet. App. 55a n.8.[6] The court of appeals reasonably pre-

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[6] Petitioners claim that the court of appeals has required plaintiffs to prove a need for different "tests" rather than for an expanded "testing regimen" (Pet. 16), and accordingly that that holding would categorically deny plaintiffs damages for x-rays or blood-count testing simply because those tests are used to detect familiar ailments (Pet. 17). Petitioners misapprehend the "special medical monitoring" requirement. The court below made clear that, in its view, Pennsylvania tort law would merely require a plaintiff to establish that his exposure to a toxic substance requires him to undertake a different examination *protocol* from that ordinarily recommended for non-exposed persons, whether or not that protocol includes tests of general applicability like x-rays. The court stated that it was affirming the dismissal of petitioners' medical monitoring claim because petitioners "failed to introduce evidence that their exposure required a different medical monitoring regimen

dicted that the Pennsylvania Supreme Court would not adopt such an expansive remedy.[7]

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than that which would normally be recommended for them absent exposure." Pet. App. 58a.

Petitioners also argue (Pet. 16-17) that the court of appeals improperly broadened the scope of the Utah Supreme Court's decision in *Hansen*, 858 P.2d at 980, by reading *Hansen* to apply beyond the example at issue in that case (in which a person is exposed a second time to a toxic substance to which he had previously been exposed). But the Utah Supreme Court did not limit its decision to that fact pattern, and the logic of *Hansen*—that a person should not be recompensed for the costs of a medical monitoring regime that he should have been undertaking without regard to toxic exposure—applies with equal force in the context of petitioners' claims. In any event, there is no requirement that Pennsylvania calibrate its medical monitoring cause of action to the causes of action of any other State, and any inconsistency between the Pennsylvania and Utah causes of action would therefore present no question warranting this Court's review.

[7] Petitioners claim that the Pennsylvania Superior Court, in which petitioners' state-law environmental claims have been pursued, has "specifically declined to adopt the Third Circuit's decision in this case to the extent that that decision created a requirement concerning different medical testing." Pet. 9-10. The Superior Court's decision (Pet. App. 2a-11a), however, did not address the elements of a medical monitoring claim, but instead addressed the issue of which "response costs" were allowable under Section 6020.702(a)(5) of HSCA, the state environmental statute, a question that the Pennsylvania Supreme Court has also not had occasion to address. Thus, there is no conflict between the decision below and the Superior Court's decision. While the court of appeals expressed the belief that the standard for recovery of medical monitoring under Pennsylvania law would be the same under HSCA and common law tort, see Pet. App. 60a n.12, that statement was dictum. The United States has petitioned the Pennsylvania Supreme Court to review the Superior Court's construction of the HSCA.

2. Petitioners also argue (Pet. 19-23) that the court of appeals erred in dismissing their medical monitoring claims based on a decision (*Paoli II*) that was first issued after argument in this case, without soliciting additional briefing from the parties. It is well established, however, that where no doubt exists about the proper resolution of a legal issue based on the undisputed record, a court of appeals may resolve the issue without affording the parties an additional opportunity to brief it. See *Singleton* v. *Wulff*, 428 U.S. 106, 121 (1976), citing *Turner* v. *City of Memphis*, 369 U.S. 350, 353 (1962). Cf. *United States* v. *New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977) (prevailing party may defend judgment on any ground supported by the record).

In the district court, petitioners had addressed the issue of the nature of the medical monitoring that would be needed. As the court of appeals observed, petitioners' own medical monitoring expert, Dr. Susan Daum, "emphasized" that the monitoring examinations that she believed were necessary were "not out of the ordinary, but consist of the usual adult medical examinations recommended for all adults with the adult risk of cancer in our society." Pet. App. 58a. Petitioners neither suggest that the court of appeals misapplied the *Paoli II* standard nor point to any portion of the district court record that could be taken to indicate that petitioners' alleged exposure to toxic substances would have necessitated a medical monitoring regime "different than the one that would have been prescribed in the absence of [the alleged toxic] exposure," *Paoli II*, 35 F.3d at 788 (citation

omitted).[8] Petitioners thus fail to show that the opportunity to submit additional briefs following *Paoli II* might have led the court of appeals to a different outcome.

The cases on which petitioners rely (Pet. 19-20) are consistent with the decision below. Those cases hold that a party must have the opportunity to present evidence on an issue before judgment can be entered against that party on that issue, and that appellate courts accordingly should not resolve issues against a party who lacked such opportunity in the district court. See, *e.g.*, *Fountain* v. *Filson*, 336 U.S. 681, 683 (1949); *Hormel* v. *Helvering*, 312 U.S. 552, 556 (1941); *FDIC* v. *Laguarta*, 939 F.2d 1231, 1240 (5th Cir. 1991); *Box* v. *A & P Tea Co.*, 772 F.2d 1372, 1376 (7th Cir. 1985), cert. denied, 478 U.S. 1010 (1986); *Charbonnages De France* v. *Smith*, 597 F.2d 406, 416 n.9 (4th Cir. 1979). As we have noted, petitioners had—and availed themselves of—the opportunity in the district court to set out the medical monitoring that their exposure would necessitate. Moreover, the cases cited by petitioner recognize that there are situations in which it is appropriate to resolve an issue not argued on appeal, particularly if (1) that issue was implicit in the issues raised below or fairly embraced within another issue raised on appeal; or (2) the record is adequately developed on that issue. *Hormel*,

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[8] Petitioners claim (Pet. 16) that Dr. Daum recommended "a different regimen, requiring that medical testing start at earlier ages and occur at greater frequency than is recommended for the general population." But petitioners point to nothing in the record that supports that characterization. Dr. Daum merely stated that she regarded it as "more urgent" than in cases of non-exposure that petitioners receive the "usual" adult medical examinations. Pet. App. 58a.

312 U.S. at 556-557 (principle that court of appeals should not rule on questions not resolved below is not "an inflexible practice"); see, *e.g.*, *Box*, 772 F.2d at 1376 (court may consider an issue implicitly included within a defendant's challenge to plaintiff's *prima facie* case); *Laguarta*, 939 F.2d at 1240 n.20.

Finally, petitioners had ample opportunity, after *Paoli II* was issued, to supplement the arguments that they had made to the court of appeals. Oral argument in this case was held on June 22, 1994, and *Paoli II* was decided on August 31, 1994. The decision in this case was not issued until June 15, 1995—nearly nine months after *Paoli II*. Petitioners did not at any point request the opportunity to brief the issue of how *Paoli II* applied to this case. Moreover, petitioners had the opportunity to seek panel rehearing and rehearing en banc of the court of appeals' decision—and they used that opportunity to claim that *Paoli II* had been wrongly applied to bar their claims of medical monitoring. Thus, petitioners cannot claim to have lacked the opportunity to advise the court of appeals of their view of how *Paoli II* applied to this case. In any event, petitioners' claim that the court of appeals erred in not affording them a greater opportunity to be heard on that issue raises no broad question warranting this Court's review.

3. Petitioners also claim that the court of appeals incorrectly held that the district court erred in its discovery-related rulings and in denying class certification. The district court acted within its discretion in making each of those rulings.

a. Petitioners claim (Pet. 23-25) that the district court erred in holding that the United States had not waived the deliberative process privilege when it produced five documents to petitioners. As the court

of appeals noted (Pet. App. 75a-76a), however, the district court analyzed that claim under the proper standard: it inquired whether the United States had "voluntarily" produced any of the five documents, and held that the production had been "inadvertent." *Id.* at 76a; *id.* at 112a, citing *Transamerica Computer Co.* v. *International Business Machines Corp.*, 573 F.2d 646, 651 (9th Cir. 1978). Petitioners' challenge to that factbound determination does not merit review.

b. Petitioners also argue (Pet. 25-27) that the court of appeals erred in upholding the Army's *Touhy* regulation, under which petitioners were barred from subpoenaing or seeking official information directly from Army employees without first seeking such information from the Army itself. Petitioners claim (Br. 26) that that regulation has the effect of denying them access to material witnesses. Petitioners' claim is unworthy of review for two reasons. First, the record affords no indication that, following the district court's decision, petitioners at any point provided the Army with the information required by the *Touhy* regulation but were prevented from directly contacting Army employees. Thus, petitioners' claim that the Army's regulation has unconstitutionally prevented them from obtaining access to witnesses is premature, and would require this Court to address a constitutional question not passed on below.

Second, petitioners raise no question of broad significance. This Court long ago held, in *Touhy* itself, that the very regulation on which the Army regulation at issue here is patterned was constitutional. See *Touhy*, 340 U.S. at 467-468. In *Touhy*, the Court reasoned that a Department of Justice regulation that prohibited departmental employees from releasing documents on their own and instead

centralized the determination of which governmental files should be released in response to discovery demands advanced a legitimate governmental interest. The Court stated: "When one considers the variety of information contained in the files of any government department and the possibilities of harm from unrestricted disclosure in court, the usefulness, indeed the necessity, of centralizing determination as to whether subpoena's *duces tecum* will be willingly obeyed or challenged is obvious." 340 U.S. at 468.

Following *Touhy*, the courts of appeals have consistently upheld similar regulations, including where the requested information was in the form of testimony, not documents. See, *e.g.*, *United States* v. *Bizzard*, 674 F.2d 1382, 1387 (11th Cir.) (regulation prohibiting a former Department of Justice employee from testifying as to information acquired during performance of his official duties, without the prior approval of the Attorney General, was constitutional), cert. denied, 459 U.S. 973 (1982); *United States* v. *Allen*, 554 F.2d 398, 406 (10th Cir.) (regulation prohibiting Department of Justice employee from disclosing information or producing material acquired as part of the performance of official duties, without prior approval by the appropriate Department official or the Attorney General, is constitutional), cert. denied, 434 U.S. 836 (1977). See also *Gomez* v. *Gates*, 25 F.3d 761, 764-767 (9th Cir. 1994) (collecting cases upholding the application of *Touhy* regulations in the context of subpoenas seeking testimony by governmental employees), cert. denied, 115 S. Ct. 898 (1995). Petitioners offer no authority casting doubt on the validity of the Army's regulation.

c. Petitioners also contend (Pet. 27-28) that the court of appeals erred in affirming the district court's

denial of class certification. Petitioners argue that certain issues in the case, including liability, could more efficiently be resolved on a classwide basis. However, the district court engaged in the correct inquiry: it asked whether, under Federal Rule of Civil Procedure 23(b)(3), "questions of law or fact common to the members of the class predominate over any questions affecting only individual members," Fed. R. Civ. P. 23(b)(3), and held that they did not. See Pet. App. 170a. The district court's opinion on that issue (*id.* at 166a-171a) thoroughly reviewed the relevant factors, and left open the possibility that changed circumstances could justify class certification at a later point. *Id.* at 171a. The court of appeals was therefore correct to hold that the district court's ruling was not an abuse of discretion. *Id.* at 28a n.2.[9]

4. Finally, petitioners argue (Pet. 28-2) that the court of appeals erred in affirming the dismissal of their claims for damages for negligent infliction of emotional distress. The courts below, however, recognized that, under Pennsylvania law, a plaintiff making such a claim must establish that he or she suffered a physical injury, and petitioners failed to do so. Instead, petitioners claimed (Pet. App. 39a-44a) that their exposure to toxic substances heightened their future risk of adverse health consequences. Under Pennsylvania law, however, mere exposure to a toxic substance is not equivalent to physical injury. *Id.* at 59a (citing cases). The courts below correctly applied

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[9] In any event, for a class action to proceed in a case based on the FTCA, each class member must have filed an administrative claim for relief before initiating litigation against the United States. See, *e.g.*, *Pennsylvania* v. *National Ass'n of Flood Insurers*, 520 F.2d 11, 23-24 (3d Cir. 1975). Petitioners have failed to establish that that requirement was met.

Pennsylvania law to the facts at hand, and in so doing implicated no federal question of any importance.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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